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STATE OF MICHIGAN
IN THE SUPREME COURT

The People of the State of Michigan	
Plaintiff-Appellant,	MSC No. 165296
v.	COA No. 353052
Lantz Washington	St. Clair County Circuit Court
Defendant-Appellee.	Case No. 19-002078-FH

Appendix to:

Defendant-Appellee Lantz Washington's Supplemental Brief

Jonathan Sacks (P67389)
Director
Natalie Unger (P86939)
Assistant Defender

Counsel for Lantz Washington

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Date: December 21, 2023

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Index of Appendices

Appendix A *Officer Whitten Report*, from Lower Court File, pp 22-23 ..... 3b-5b

Appendix B Probable Cause Hearing Relevant Transcript Pages 6b-9b

Appendix C First Competency Hearing Relevant Transcript Pages 10b-13b

Appendix D Second Competency Hearing Relevant Transcript Pages 14b-17b

Appendix E January 27, 2020, Motion Hearing Relevant Transcript Pages 18b-21b

Appendix F January 28, 2020, Trial Relevant Transcript Pages 22b-51b

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Appendix A
Officer Whitten Report,
from Lower Court File, pp 22-23

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On the above date and time I was dispatched to the Blue Water Bridge, located at 2321 Pine Grove Avenue, in reference to a male subject who had crossed the bridge and caused the Canadian Border Agents trouble. The male subject was said to have fought with Canadian Border Agents and was found to be in possession of body armor and a knife.

REPORTEE STATEMENT

Upon arriving on location, I spoke with Customs and Border Protection Agent Paul Stockwell, badge #CAQ05846. Agent Stockwell advised that he was in formed by Canadian Customs that a male subject, identified as LANTZ HOWARD WASHINGTON, black male, DOB 12-13-61, had "blown past" their toll booths and parked in an area designated only for Canadian Customs agents.

Agent Stockwell stated that Canadian Customs informed him that WASHINGTON exited his vehicle and was wearing body armor under a red t-shirt at the time. STOCKWELL stated that while Canadian Customs was placing him into custody, he did resist. After a short period of time he was placed under arrest, where he was taken back to U.S. Customs to be dropped off and left there.

Agent Stockwell stated that the Canadian Customs agents turned over WASHINGTON'S body armor and knife that he had in his vehicle, along with miscellaneous other property. After this point, Agent Stockwell called Central Dispatch to have the Port Huron Police Department handle the matter.

It should be noted that after speaking with STOCKWELL, I was handed WASHINGTON'S body armor, his knife, his wallet, and miscellaneous paperwork. This property was placed in the rear of my patrol vehicle after I had obtained it.

STATEMENT / WASHINGTON

I did speak with WASHINGTON in an attempt to gain a statement. I read him his Miranda Rights from the St. Clair County Prosecutor's Office Miranda Rights card. WASHINGTON advised that he wished to speak with a lawyer after hearing his rights.

TRANSPORT TO JAIL

I transported WASHINGTON to the St. Clair County Jail to be lodged on the charge of Felon in Possession of Body Armor, without incident.

EVIDENCE

EXHIBIT A

Certified Document - File Locator: STC-K5DBSE-2D2816FE - Friday, April 12, 2019 10:26 AM Eastern Daylight Time - Page 6 of 18

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I collected the body armor and WASHINGTON'S knife. The body armor was placed on evidence at the Port Huron Police Department in a temporary locker. WASHINGTON'S knife was placed for safekeeping at the Port Huron Police Department, also in a temporary locker.

CANADIAN CUSTOMS STATEMENT

I conducted follow up with Canadian Border Services Officer Matthew Lavers, badge #20817, in reference to this incident. Officer Lavers stated that just after 5:00 p.m., on the above date, WASHINGTON "blew through the booth at a high rate of speed" and drove to a secondary booth. It was at this point that Officer Lavers stated that WASHINGTON exited the vehicle with his hands up, stating "They're going to kill me".

After stating this, Officer Lavers stated that WASHINGTON went down to the ground and as WASHINGTON was going down to the ground, Officer Lavers observed that he was wearing body armor under a red shirt. After going to the ground, WASHINGTON stood up and Officer Lavers, along with other Canadian Customs agents, placed WASHINGTON into custody after a brief struggle.

Officer Lavers stated that after placing WASHINGTON into custody, they drove WASHINGTON over to U.S. Customs and dropped him off there.

It should be noted that Officer Lavers stated that the body armor was, in fact, on WASHINGTON'S person during his dealings with him. When I questioned Officer Lavers as to if there was anything else on WASHINGTON'S person, he advised that there was nothing but a wallet and Chapstick on his person. Officer Lavers stated that the knife that belonged to WASHINGTON was found in his truck.

VEHICLE IMPOUND

The vehicle WASHINGTON was driving, which was identified as a blue 2001 Ford F250, license plate number EAJ0981, was impounded by Officer Cook. The vehicle was entered into LEIN as impounded under LEIN reference number 42609473.

ADDITIONAL STATEMENTS

While at the St. Clair County Jail, I did hear WASHINGTON speaking to a deputy, in which he advised that he was wearing the body armor and that he was wearing the body armor due to the fact that people were trying to kill him.

REQUEST TO CHARGE

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Appendix B
Probable Cause Hearing
Relevant Transcript Pages

BVC

STATE OF MICHIGAN

IN THE 72ND DISTRICT COURT FOR THE COUNTY OF ST. CLAIR

STATE OF MICHIGAN,

v

LANTZ HOWARD WASHINGTON,

Defendant

Case No.: 19-P02399-FY

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PROBABLE CAUSE CONFERENCE
BEFORE THE HONORABLE CYNTHIA S. PLATZER
72ND DISTRICT COURT JUDGE

Port Huron, Michigan - Tuesday, April 23, 2019

APPEARANCES:

For the People: MS. MICHELLE WEEKS P-80430
Assistant Prosecuting Attorney
201 McMorran Boulevard, Room 3300
Port Huron, MI 48060 (810)985-2400

For the Defendant: MS. LESLEY J. CLARK P-41294
411 Fort Street, Suite B
Port Huron, MI 48060 (810)292-4928

Transcribed By: Melanie A. Gillies, CER8234
201 McMorran Boulevard
Port Huron, MI 48060 (810)985-2206

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7b

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eighteenth. I did go see my client on the nineteenth; he informed me that he had been at the hospital. I do -- he was gracious enough to give me the paperwork, there was a petition filed, a mental petition filed on Mr. Washington, he did sign a referral on the seventeenth and Doctor -- I do believe Dr. Jerry diagnosed him with schizoaffective disorder and Dr. Bradley also said schizoaffective disorder and acute psychosis. I do have a copy of the paperwork for the Court. I have concerns about his criminal responsibility and also his competency and I'm asking at this time that he be sent for a forensic exam. I did talk to the prosecutor about that and I thought I had filed a motion earlier this week, but instead it was a copy of the orders that got filed with this Court. So, I asked my secretary to do that and she thought I just wanted the orders. I do have the paperwork if the Court does want to see it.

THE DEFENDANT: Your Honor, could I respond to that, please?

THE COURT: Sure.

THE DEFENDANT: I feel there is a conflict of interest here with the attorney and everyone in this matter because of the property that I purchased in Idlewild, Michigan. I purchased property in Idlewild, Michigan, for five thousand dollars. After I purchased that property I

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THE DEFENDANT: Okay.

THE COURT: Stay on track, stay on focus, you'll be fine.

THE DEFENDANT: Okay. Okay. Thank you.

THE COURT: Okay.

THE DEFENDANT: Thank you, your Honor.

THE COURT: All right. I don't think we can proceed any further in this until we hear from the forensic center.

MS. CLARK: Thank you, your Honor.

THE COURT: And I appreciate your looking out for him.

MS. CLARK: Thank you.

THE DEFENDANT: Thank you. Thank you.

THE COURT: Okay. I think we're all set today.

THE DEFENDANT: Thank you, thank you.

MS. CLARK: Thank you, your Honor.

THE COURT: You're welcome.

(at 10:27 a.m., proceedings concluded)

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Appendix C
First Competency Hearing
Relevant Transcript Pages

EVC

STATE OF MICHIGAN

IN THE 72ND DISTRICT COURT FOR THE COUNTY OF ST. CLAIR

STATE OF MICHIGAN,

v

LANTZ HOWARD WASHINGTON,

Defendant

Case No.: 19-P02399-FY

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STATE APPELLATE DEFENDER OFFICE

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COMPETENCY HEARING
BEFORE THE HONORABLE CYNTHIA S. PLATZER,
72ND DISTRICT COURT JUDGE

Port Huron, Michigan - Friday, May 31, 2019

APPEARANCES:

For the People: MS. JENNIFER DEEGAN P-57234
Assistant Prosecuting Attorney
201 McMorran Boulevard, Room 3300
Port Huron, MI 48060 (810)985-2400

For the Defendant: MS. LESLEY J. CLARK P-41294
411 Fort Street, Suite B
Port Huron, MI 48060 (810)292-4928

Transcribed By: Melanie A. Gillies, CER8234
201 McMorran Boulevard
Port Huron, MI 48060 (810)985-2206

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11b

competency to stand trial. Has everyone received a copy of that, of both of those communications, the letter and the report?

MS. DEEGAN: Your Honor, I know the People have received it; Mr. Sparling I believe thoroughly reviewed it.

THE COURT: Thank you.

MS. CLARK: Your Honor, for the record, I have received it, I thoroughly reviewed it. I also gave a copy to my client, we have discussed it and he has thoroughly reviewed it.

THE DEFENDANT: Yes, your Honor, I have received a copy.

THE COURT: Very good. And the determination is that at the present time Mr. Washington is incompetent to stand trial. Does anyone disagree with that conclusion, Prosecution?

MS. DEEGAN: No, your Honor.

THE COURT: Thank you. Defense?

MS. CLARK: Your Honor, after speaking with my client, he does not disagree with it, is that correct?

THE DEFENDANT: That's correct.

THE COURT: Okay. So then I've read that report, it is incredibly thorough, that's a nine page report. And it looked to me like the examiner spent an awful lot of time going over the historical issues, the current issues

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and then discussing things carefully with Mr. Washington. I don't have any reason to question that examiner's conclusion at this time in determining that Mr. Washington's incompetent. So what I would do then at this point, we need to enter an order that requires that the department of community health is named the medical supervisor of treatment and let's get Mr. Washington some help. We need you to get into treatment, Mr. Washington, to make things hopefully a whole lot easier for you.

THE DEFENDANT: Okay.

THE COURT: All right. So Ms. Clark -- or is prosecution presenting an order or is that Ms. Clark?

THE DEFENDANT: Usually the defense does, your Honor, but we can.

MS. CLARK: It is probably going to be me, your Honor.

THE COURT: Okay.

MS. CLARK: Because I made the motion.

THE COURT: Thank you.

MS. CLARK: I'm sorry, your Honor?

THE COURT: I just need an order that encompasses the conclusion here of the examiner as well as the -- the referral to department of community health as the medical supervisor of treatment. We just need --

MS. CLARK: Okay. Your Honor, I will get that.

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Appendix D
Second Competency Hearing
Relevant Transcript Pages

STATE OF MICHIGAN

IN THE 72ND DISTRICT COURT FOR THE COUNTY OF ST. CLAIR

STATE OF MICHIGAN,

v

LANTZ HOWARD WASHINGTON,

Defendant

Case No.: 19-P02399-FY

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STATE APPELLATE
DEFENDER OFFICE

COMPETENCY HEARING
BEFORE THE HONORABLE CYNTHIA S. PLATZER,
72ND DISTRICT COURT JUDGE

Port Huron, Michigan - Tuesday, August 27, 2019

APPEARANCES:

For the People: MS. MEGAN LEYVA KELLEY P-82432
Assistant Prosecuting Attorney
201 McMorran Boulevard, Room 3300
Port Huron, MI 48060 (810)985-2400

For the Defendant: MS. LESLEY J. CLARK P-41294
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Port Huron, MI 48060 (810)292-4928

Transcribed By: Melanie A. Gillies, CER8234
201 McMorran Boulevard
Port Huron, MI 48060 (810)985-2206

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THE DEFENDANT: Yes. Yes I have, your Honor.

THE COURT: And did you read all three pages?

THE DEFENDANT: Yes I have, your Honor.

THE COURT: All right. And prosecution, what position do you take on that report?

MS. KELLEY: We would also agree with the report, your Honor.

THE COURT: All right. Is there anything either party wishes to present apart from the report, Prosecution?

MS. KELLEY: No, your Honor.

THE COURT: Defense?

MS. CLARK: No, your Honor.

THE COURT: Very good. And, Mr. Washington, do you stipulate that I should consider this report in determining your competency to stand trial?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. This is an entirely different person that I'm seeing here today. All right. I don't have any reason to question what the conclusion is, that is that you are competent to stand trial. I have read this report, I read the previous report, huge difference between that and this and I suspect it has to do with them getting some meds regulating your chemicals within your body.

THE DEFENDANT: Yes.

THE COURT: It looks like you're doing pretty

16b

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darn well, Mr. Washington. I am going to adopt the conclusion of the psychiatrist, that is that Mr. Washington is at the present time competent to stand trial. So, are you taking meds right now?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Good. The jail is ordered to continue to administer the appropriate medications while this matter is pending. All right. And then that brings us to the probable cause conference.

MS. CLARK: Your Honor, after speaking with Mr. Washington both last night and this morning, it's my understanding he does want this set on for a preliminary exam.

THE COURT: Good.

MS. CLARK: He also did inform me just about five minutes ago that he no longer wants me for his attorney, so I will be looking at doing a motion to withdraw.

THE COURT: Okay. But this is court appointed, so you need to talk to a Circuit Judge about that.

MS. CLARK: I will, your Honor.

THE COURT: Okay. All right. All right. This matter will continue to a preliminary exam hearing, which we're going to do just next Tuesday, next Tuesday at one thirty. That is Tuesday, September third at one thirty p.m. The bond as set by the magistrate continued except

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Appendix E
January 27, 2020, Motion Hearing
Relevant Transcript Pages

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Case No. K-19-002078-FH

LANTZ HOWARD WASHINGTON,

Defendant.
_____/

Received
JUN 29 2020
SADO Lansing

MOTION

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE ELWOOD L. BROWN, Judge, 31st Judicial Circuit, at Courtroom 3500, County Building, Port Huron, St. Clair County, Michigan, on Monday, January 27, 2020.

APPEARANCES:

PAUL SODERBERG, ESQ.
Assistant Prosecuting Attorney
201 McMorran Boulevard, Suite 3300
Port Huron, MI 48060

On behalf of the People:

PATRICK J. POLITANO, ESQ.
Attorney at Law
420 S. Water Street, #249
Marine City, MI 48039

On behalf of the Defendant:

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it will be -- the jury then would, of course, be instructed that Mr. Washington is, has been convicted of a violent felony and is a felon. So -- and the question for them remains that whether or not he is in possession of body armor?

MR. SODERBERG: Correct, your Honor.

THE COURT: Okay. Thank you.

MR. SODERBERG: And then the last housekeeping matter that -- and so I am again, it's a quick matter, the People have been attempting for numerous occasions, just to give everyone a heads up to get Officer Lavers from the Canadian Border Services Agency over here to testify in this case. The Canadian government has officially as of Friday evening denied that request to get him over here. Therefore, the People -- he is unavailable to the People. People have certainly all the communications through e-mails and requests. Because that officer is not present, the People will not be able to produce him. He is unavailable from the People's perspective. I'm not sure if Mr. Politano wants to argue differently. We can prepare for that. But that stated, because that officer is not going to be available, the People will not be proceeding on the driving while license suspended charge. We will only be proceeding on the felon in possession -- violent felon in possession of body armor. And I just

wanted that housekeeping matter made clear.

MR. POLITANO: Mr. Soderberg had informed me -- I didn't know the last part of it, but we had talked about what would happen if the Canadian witness was unavailable. It is what it is.

THE COURT: Well, it is what it is.

MR. POLITANO: It is what it is.

MR. SODERBERG: Thank you, your Honor.

MR. POLITANO: Thank you, your Honor.

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Appendix F
January 28, 2020, Trial
Relevant Transcript Pages

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

THE PEOPLE OF THE STATE OF MICHIGAN,

v. Case No. K 19-002078 FH

LANTZ HOWARD WASHINGTON,

Defendant.
_____/

JURY TRIAL
VOLUME 1

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE ELWOOD L. BROWN, Judge, 31st Judicial Circuit, at Courtroom 3400, County Building, Port Huron, St. Clair County, Michigan, on Tuesday, January 28, 2020.

APPEARANCES: PAUL J. SODERBERG, P70205
ASSISTANT PROSECUTING ATTORNEY
201 McMORRAN BOULEVARD, ROOM 3300
PORT HURON, MICHIGAN 48060

On behalf of the People

PATRICK POLITANO, P56163
ATTORNEY AT LAW
420 SOUTH WATER STREET, #249
MARINE CITY, MICHIGAN 48039

On behalf of the Defendant
Lantz Howard Washington

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They're holding me to protect me, mother."

"So how come you can't tell them you want to go?"

"Mom, it's a long story, I can't explain."

And that's where I redacted all from there. And that will get to the next, that will get to the next motion, but I'll, I'll, I'll save that for that second part.

The issue in this matter is can the People lay a foundation for the admission of those, that body armor, and the People certainly can. The, the Defendant, the People can say where that vest came from, who gave it to the, to the law enforcement and, and how it came to our possession, and that has been kept in our custody ever since. They can give that as much weight as they want because frankly if it's a foundational issue it's Agent Stockwell having received it from Officer Lavers.

The question then becomes is the corpus delicti satisfied. So, the seminal case on corpus delicti is *People v Williams* which is 422 Michigan 381, a 1985 Supreme Court case. And most the corpus delicti cases deal with homicides. And essentially it goes back to the common law, you know, with, with sailors and so forth where a person ends up missing on a ship. If we don't have a body can you have a crime. Well, in this case, you

know, the Court explains corpus delicti and what that means as it relates to a Defendant's admission. And in this case the People are arguing we have two such admissions. One, the night of; and the second one on April the 27th.

And in the *People v Williams* the Court specifically stated, "Once it is shown that a specific injury or loss has occurred and that some person's criminality was the source of that cause is the test of whether a criminal case can go forward."

So, in this case what is a specific injury or loss? In this case it's possession of body armor. The People are alleging that the Defendant had possession of body armor as a violent convicted felon, that he possessed it in the United States coming over from Port Huron. And that's based on the circumstantial evidence, and that's what it really does come down to. How can he possess something in the United States if he's found in Canada. Well, we have the evidence that he was driving over the border and he's turned back by the officers from the border patrol. There's nowhere between Port Huron and Canada on that bridge to pick up body armor, and he's returned with body armor.

What we do know is that there is body armor which is the specific injury or offense, and we are

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alleging that the Defendant possessed it. We had those circumstances. The next thing that corroborates that is the Defendant's own statement. He's not saying I killed Kennedy or I killed Hoffa or some other crime that we can't connect him to. He is, he is brought back with body armor and then he makes admission to it, and that he was in Port Huron.

People agree that the only evidence that the People had were Officer Lavers. The People agree that if we don't have the Defendant's statements we don't have a case; we can't prove a, that, that issue. But where he makes admissions to it it satisfies the corpus delicti and all that is relevant and comes in. So, therefore, based on all of that the People would ask that your Honor deny this Motion in limine and the People be allowed to proceed.

MR. POLITANO: Very briefly, your Honor.

Once again the Prosecutor doesn't address my fundamental argument which is whose bulletproof vest is it? How do we know? How do we have any connection to Lantz Washington unless we're using Officer Lavers handing this over and saying this is what he was wearing. Without that hearsay there's no way to establish at all. Ms. Fenner has no sight, she didn't see anything. We know that.

Defendant back in custody, brings back the body armor that the Defendant -- well, you're going to hear that the Defendant had in his possession when he's stopped in Canada.

In addition to the Defendant and the body armor being returned to the, the Border Patrol, the Defendant's truck was also returned. But you're going to hear that Officer -- and then you're going to see the body armor. The body armor will be admitted into evidence. But you're going to hear that Officer Whitten from the Port Huron Police Department was called by the Border Patrol on the American side, the border agent to that they have an individual that was in possession of body armor. And Officer Whitten came and placed the Defendant under arrest, took possession of the body armor and the Defendant's truck was impounded.

But you're also going to hear is that the Defendant while he was being process for the charges that night made a statement at the jail facility in St. Clair County here that he was wearing the body armor. You're also going to hear a recording that the Defendant made on April the 27th, so approximately 19 days later, that the Defendant made in a call to his mother. And you're going to hear that. And you're going to hear the Defendant admit to his mother that on the date in question he was,

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Q Would that be about 90 percent of your work?
A Yes, sir.
Q Okay. And just if general what does that involve?
A That involves ensuring that people have a safe and efficient passage into Canada.
Q Okay. And as part of that safe and efficient passage do you collect money from --
A Yes, sir.
Q -- each passenger or each car going through?
A Yes, sir.
Q And just generally speaking, what is the process of accepting and allowing a person to pass through?
A First of all, they stop. There is a sign stop until pending traffic is clear. They come up, pay the toll, the gate lifts, they leave.
Q Okay. And so you mentioned a gate?
A Yes.
Q Is there a gate at each of those outgoing toll booths?
A Yes, sir.
Q And would that be like a draw arm?
A Yes.
Q Is that a good way of --
A Yes.
Q -- explaining it?
That goes up and down?

A Yes, sir.
Q And once that toll is paid the arm goes up and the car can pass through?
A Correct.
Q Does the arm stay up or does it go back down?
A It goes back down.
Q Okay.
Until the next person pays?
A Correct.
Q Okay.
I want to take your attention, Ms. Fenner, back to on or about April the 8th, 2019. Do you recall working in that capacity as a bridge safety officer at the Blue Water Bridge?
A Yes, sir.
Q And you were working that, around 5:00 p.m. that day?
A Correct.
Q And just for clarification where that toll is located where is that located in this state?
A In this state?
Q What city is that in?
A Oh, Port Huron, Michigan.
Q In St. Clair County?
A Yes.
Q Okay. And so on that date in question was that a, was

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that a normal working day for you?

A Yes.

MR. SODERBERG: Your Honor, permission to approach the witnesses?

THE COURT: Go ahead.

MR. SODERBERG: Your Honor, if I may have continuing permission?

THE COURT: You don't need to ask anymore.

MR. SODERBERG: Thank you.

THE COURT: Don't stay up by the witness after you're finished.

MR. SODERBERG: Yes, sir.

BY MR. SODERBERG:

Q Ms. Fenner, I'm going to show you what's been marked for identification purpose as People's Exhibit 1, 2, 3, 4 and 5. Do you recognize what those are aerial photographs of?

A They are aerial photographs of the Blue Water Bridge plaza.

Q Okay.

A Blue Water Bridge.

Q And does, just essentially like Google aerial photographs, would you agree with that?

A Yes.

Q Are those fair and accurate depictions of what the Blue Water Bridge looks like?

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Yes.
Q And they will help you illustrate your testimony to the Jury here today?
A Yes.

MR. SODERBERG: Your Honor, at this time the People would move to admit People's Exhibits 1 through 5.

MR. POLITANO: No objection, your Honor.

THE COURT: All right. One through five will be admitted.

(People's Exhibits 1-5 were received.)

MR. SODERBERG: And your Honor, if I may publish them on the television.

THE COURT: Go ahead.

BY MR. SODERBERG:
Q Ms. Fenner, I'm going to first show you what's been entered as People's Exhibit 1. What do you recognize again this to be a photograph of?
A The Blue Water Bridge.
Q Okay. And just for the record, this, this road that goes from the left side to the right side, what is that, that I'm pointing to on the photograph?

This area right here (indicating)?

A That's the Blue Water Bridge.

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Q That's the actual Blue Water Bridge?
A Yes.
Q Okay. And then what would this area be right here (indicating)?
A That's our toll plaza.
Q Okay. And then over here would be (indicating)?
A Canadian Customs and Immigration.
Q Okay.

Showing you what's been entered as People's Exhibit 2. What is that a photograph of?

A That looks like our toll plaza.
Q Okay.

So this is a zoomed up --

A Our toll booths.
Q I'm sorry?
A Our toll booths.
Q Okay. And I'm, I'm highlighting this area right here. What would that area be?
A That is the south barrier wall, I believe.
Q Okay. And it looks like there, are there two lanes of direction for travel along the bridge?
A Yes.
Q Which directions are they?
A East and west.
Q Okay.

RECEIVED by MSC 12/21/2023 11:06:26 AM

So east would be going to Canada?
A Yes, sir.
Q West would be coming back from Canada?
A Yes.
Q And so the eastbound traffic, would that be towards the bottom or towards the top of this picture if it's going to Canada (indicating)?
A Eastbound would be towards the bottom.
Q So would that be this area right here (indicating)?
A Yes.
Q And so would that be fair to say that this area would be where the toll booths are located?
A Correct.
Q Okay. And so on that day in question you would have been working in this area; is that correct (indicating)?
A The center one.
Q Somewhere in here (indicating)?
A Yes.
Q Okay. And again, once the people pay they go this way across the bridge (indicating)?
A Yes.
Q Okay.
People Exhibit 3, that's just a further up photograph of the American side, is that correct, of the Blue Water Bridge?

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A Correct.
Q It shows that curve in the bridge or at least the sort of a right, rightish curve towards the east; is that correct?
A Yes.
Q People Exhibit 4, what is that aerial photograph of?
A Those are our toll booths (indicating).
Q If I may approach you and show you People's Exhibit 4 on this photograph here. Do you recognize that as the American or the Canadian side?
A The Canadian side.
Q Okay.
So that's the Canadian side?
A Yes.
Q And that would be the customs and toll area there (indicating)?
A Correct.
Q Okay. And then People's Exhibit 5, and just want to clarify, you're not familiar with anything about the Canadian side or how it works?
A No, sir.
Q That's not -- you're familiar with that area because you've been over there?
A Correct.
Q Okay. And then People's Exhibit 5, that's, is that another photograph of the Canadian side --

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Yes, sir.
Q -- at the bridge. Okay.
Ms. Fenner, around 5:00 p.m. on that date in question, April the 8th, 2019 at the bridge, do you recall what toll you were working? What toll number?
A Toll booth number four.
Q Okay. And did anything unusual happen around that time frame that you recall?
A We had a vehicle that actually blew through my lane.
Q Okay. And explain what you mean by blew through your lane?
A Blew through without stopping or paying the toll or acknowledging anything.
Q Okay.
Was the draw arm up or down when the person blew through your lane?
A It was up.
Q Okay. And how would it have been up at that point?
A The vehicle before him had just exited.
Q Okay.
Paid and allowed the draw arm to go up?
A Yes.
Q And so he, he, whoever that, whatever vehicle that was driving through blew through that lane?
A Yes.

RECEIVED by MSC 12/21/2023 11:06:26 AM

Q Okay.

When that vehicle blew through that lane, were you able to identify any person in the car?

A No, sir.

Q You weren't able to see who was in the car or anything about that?

A No, sir.

Q Okay.

When that individual drove through the lane without paying, or blew through the toll booth, what did you do?

A I picked up my too-two way radio, advised my supervisor what was going on because anything unusual I have to report.

Q Okay. And you're familiar with the process of the bridge or what happens when a person blows through a toll booth like that and you radio to your supervisor what the process is?

A Yes, I call my supervisor and then he takes it.

Q Okay.

A You know, contacts whoever he needs to from there.

Q Okay.

So there is a notification process to let any authorities that be know that there's a person that jumped the toll?

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Very quick.
Q Do you think maybe a second or two?
A A few seconds.
Q And to clarify, you stated you weren't able to tell who was in the truck, correct?
A No, sir.
Q So, you wouldn't of been able to tell if it was a man or woman?
A No, sir.
Q You wouldn't of been able to tell how many people were in the truck?
A No, sir.
Q You wouldn't have been able to tell what anyone was wearing?
A No, sir.
Q You wouldn't have been able to tell if anyone was wearing a bulletproof vest, correct?
A Oh, no, sir.
Q Once you call your supervisor do you have any direct knowledge, not what he might have told you, but do you have any direct knowledge of him calling anyone else?
A No, sir.

MR. POLITANO: I have no further questions, your Honor.

THE COURT: Mr. Soderberg.

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Supervisory officer.
Q So you go by Officer Stockwell; is that correct?
A Yes, sir.
Q Officer Stockwell, how long have you been working for Customs and Border Protection?
A About 12 years.
Q And in general what, what job do you do there?
A I was, I was an officer up until about two years ago. And then two years ago I got promoted to a supervisor position where I oversee shift operations.
Q And part of your Border Protection, Customs and Border Protection duties are you stationed anywhere in particular?
A Passenger processing building.
Q Okay. And is that at the Blue Water Bridge?
A It is, yes.
Q And would that be a point of entry into the United States?
A Yes, sir.
Q And, and the departure, as well?
A Yes.
Q And so in general when individuals leave or more specifically when they return to the United States, it's your agency's job to question who those people are and determine if they are permitted to come to the country and so forth?

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Yes, we'll inspect every single person that re-enters into the U.S.

Q Okay.

I want to take your attention back to on or about April the 9th, 2019 of last year. Do you recall if you were working as a supervisory manager at the Blue Water Bridge on that occasions?

A I was, yes, sir.

Q And again, that's for Customs and Border Protection?

A It was.

Q And on or about that day, around 6:00 p.m., did you make contact with anyone from the Canadian Border Service Agency?

A Yes.

Q With who did you make contact?

A The, the supervisor on the other side just let us know that he was coming back.

Q Okay.

Well, without, without saying --

A Yep.

Q -- what anyone said.

A So, so then they, they showed up at the lane 5A at the Blue Water Bridge.

Q Okay.

A And met with CBSA Lavers.

RECEIVED by MSC 12/21/2023 11:06:26 AM

Q Okay.

That's Canadian Border Service?

A I'm sorry, yes. Canadian Border Service Agency, CBSA.

Q Okay. And that's Officer Lavers --

A Yes.

Q -- from that agency.

What was Officer Lavers doing or what did he, what did he do when he came to lane five?

A There was CBSA cruiser first and then there was a follow-up vehicle also belonged to CBSA, and then a Ford pick up truck. The three of them all rolled into 5A together, one after the other. And they had an individual in the back of the cruiser in the first car, and then there was five or six CBSA officers in tow as well.

Q Okay.

I'm going to turn your attention just briefly to the screen there for what's already been admitted as People's Exhibit 3. Do you recognize what that's an aerial photograph of?

A Yes, sir.

Q And would this, what is this area right here (indicating)?

A So, on the top side of that is all entry into the United States.

Q Okay.

A And then on the bottom side is commercial trucks, and then

RECEIVED by MSC 12/21/2023 11:06:26 AM

that's toll booths outbound to Canada down here (indicating). Yes, sir.

Q Okay.

So then there's a building right here; is that correct (indicating)?

A Yes, it is.

Q And what building is that?

A That's the passenger processing building, the one I work out of.

Q Okay.

So when you said the two CBSA, the Canadian vehicles and then a Ford truck?

A Yes, sir.

Q You said it came into lane five, that would have been one of these lanes?

A It's, it's the very last lane to the bottom. Very first lane next to the building below, the one down.

Q Right around here (indicating)?

A Right there.

Q Right there, okay.

A Yep.

Q And so you said there was an individual being transported back; is that correct?

A Yes, sir.

Q That individual was, was he taken into custody by you and

RECEIVED by MSC 12/21/2023 11:06:26 AM

your agency?
A He was.
Q Do you see that individual here in the courtroom today?
A I do, yes, sir.
Q Can you point him out and identify a piece of clothing item that he's wearing, the color clothing that he's wearing?
A The dark sweatshirt there, sitting at the table.

MR. SODERBERG: Okay.

Your Honor, I ask that that reflect identification.

THE COURT: Record will reflect the witness has identified the Defendant.

BY MR. SODERBERG:
Q And that, that Defendant's name, do you recall his name?
A Mr. Washington.
Q Okay. And you were able to identify him?
A Yes, sir.
Q Okay.

Who gave you custody of the Defendant at that location?

A I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.
Q Okay, so a collective group of you?

RECEIVED by MSC 12/21/2023 11:06:26 AM

A I did.
Q Okay.
Did you make your way to that location and investigate that?
A I did.
Q When you got to that location, who did you make contact with?
A Agent Stockwell.
Q When you, when you made contact with Officer Stockwell, he's the, the individual that works at the Customs and Border Protection?
A That's correct.
Q Did you have communications him at that location?
A I did.
Q And as a result of that communication what did you do? Did you take custody of anyone?
A I did.
Q Who did you take custody of?
A Mr. Lantz Washington.
Q Okay.
Do you see that individual in the courtroom here today?
A I do.
Q And do you, do you recognize him and can you point him out and identify the color of clothing that he's wearing?

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Sure, he's seated to my right at the defense table wearing all black and white framed glasses.

MR. SODERBERG: Your Honor, I ask that that reflect identification, as well.

THE COURT: Record may so reflect.

BY MR. SODERBERG:

Q You took possession, did you take possession of any body armor at that time, as well?

A I did.

Q And I'm going to show you what's been admitted as People's Exhibit 20. Do you recognize this?

A I do.

Q What do you recognize this item to be?

A The body armor that I collected on the dated in question.

Q And this was transferred over to you by Officer Stockwell?

A That's correct.

Q When you took possession of the Defendant was he wearing any specific type of clothing that you recall?

In other words do you recall what his shirt would have looked like?

A I don't.

Q You don't, okay.

In addition to that, was there anything else that was, was there a vehicle that was impounded as a part of your investigation?

RECEIVED by MSC 12/21/2023 11:06:26 AM

A Yes.
Q What do you recall about that vehicle?
A I believe it was a blue, I want to say 2001 Ford F-250.
Q And that was turned over to you by Officer Stockwell, as well?
A That's correct.
Q And that was impounded per this process?
A That was.
Q At a certain point you processed, you took, when you took possession of the body armor you took it back to your police department and put in into evidence; is that correct?
A That's correct.
Q I'm going show you what's marked for identification purpose as People's Exhibits 12 through 15. Do you recognize 12, 13, 14, 15? Do you recognize what those are photographs of?
A I do.
Q Those are photographs -- what are those photographs of?
A The body armor you just brought up here.
Q All right. And those are fair and accurate and help you, helping your testimony to the Jury here today?
A Yes.

MR. SODERBERG: Your Honor, at this time the People would move to admit People's Exhibits 12 through

RECEIVED by MSC 12/21/2023 11:06:26 AM

15.

THE COURT: Mr. Politano.

MR. POLITANO: So he, did he testify he took the pictures of that?

MR. SODERBERG: I didn't ask him that.

BY MR. SODERBERG:

Q Did you take the photographs of those?

A I did.

MR. POLITANO: No objection then, your Honor.

THE COURT: I'll receive Exhibits 12 through 15.

(People's Exhibits 12 through 15 were received.)

BY MR. SODERBERG:

Q And I'll just briefly, quickly go through this, Officer Whitten, if you'll look over to the screen.

Is that a photograph that you took on April the 8th of the body armor in question?

A It is.

Q People's Exhibit 13, another photograph --

A Yes.

Q -- of the body armor. And that, those are the front side of the body armor; is that correct?

A Yes.

Q People's Exhibit 14, is that a photograph of the back side

RECEIVED by MSC 12/21/2023 11:06:26 AM

--

A Yes.

Q -- of the body armor?

And lastly, People's Exhibit 15. That's another photograph of the back side of the body armor; is that correct?

A That's correct.

Q As part of your process here, when you took the Defendant into custody did you transport him to the St. Clair County Jail?

A I did.

Q And the Defendant would have been processed there, correct?

A That's correct.

Q Now, you did not interview the Defendant on this occasion, correct?

There was no interview done of the Defendant, correct?

A Correct.

Q But as part of the booking process, did you overhear the Defendant say anything specifically about this case?

A I did.

Q And what did you hear him say?

MR. POLITANO: Objection, Judge, it's hearsay.

MR. SODERBERG: About what the Defendant said.

RECEIVED by MSC 12/21/2023 11:06:26 AM

THE COURT: What the Defendant said?

MR. POLITANO: Yeah.

THE COURT: No, it's not hearsay.

MR. POLITANO: Okay.

THE COURT: I don't find it's hearsay. Go ahead.

BY MR. SODERBERG:

Q What did you overhear the Defendant say specifically as it relates to this case?

A I overheard the Defendant say that he was wearing the body armor because he was afraid people were going to kill him.

MR. SODERBERG: May I have one moment, your Honor? No further questions, your Honor.

THE COURT: Mr. Politano.

MR. POLITANO: Briefly, your Honor.

CROSS-EXAMINATION

BY MR. POLITANO:

Q Good afternoon, Officer.

A Good afternoon. How are you?

Q Good, how are you?

A Good.

Q When you came into contact with Mr. Washington was he wearing the body armor?

A No.
Q Did you ever see him wearing body armor?
A I did not.
Q Did you ever see him in possession of that body armor, say holding it or doing something with it?
A No.
Q Did you ever observe either officer Stockwell or some of the Canadian people removing the body armor from him?
A I did not.
Q Is it fair to say then that you have no actual direct knowledge of him wearing the body armor in any way, shape or form? By direct knowledge I mean things you observed, your own observations, not what someone might have told you?
A I never observed him wearing the body armor if that's what you're asking.
Q Yes.
As it relates to when he was processed at the jail, how big is the booking area at the jail?
A It's not that big. I can't --
Q Is it a small room?
A It's smaller, yes.
Q Roughly the size in feet, is it a six by eight room, a little bigger, a little smaller than that?
A Larger than that, yeah.

RECEIVED by MSC 12/21/2023 11:06:26 AM

RECEIVED by MSC 12/21/2023 11:06:26 AM

Q Larger.

When he was being booked who was in the room with him?

A Myself and jail deputies.

Q How many deputies?

A I can't tell you.

Q And was there a discussion going on between the deputies and Mr. Washington while he was being booked? Were the deputies talking to Mr. Washington?

A Yes.

Q Were any of the deputies talking among themselves?

A I don't recall that.

Q Were you any part of the conversation with the deputies or the conversation with Mr. Washington?

A Are you asking if I ever conversed with the deputies while I was in that room?

Q Yes. So there's a conversation going on as he's being booked, correct?

A Well, as far as the conversation I can't say for sure, but they do speak to each other. They ask him questions and they talk back and forth, yes.

Q And were you a part of that process of them talking?

A I don't believe I was, but I would have been there filling out paperwork while they were doing that.

Q And so at least in the room there were some deputies which

RECEIVED by MSC 12/21/2023 11:06:26 AM

THE COURT: Be seated please. The Jury has signaled that they have arrived at a verdict, so at this time I'm going to ask the bailiff to bring the Jury out so we can proceed to take their verdict.

THE BAILIFF: Yes, your Honor. Jury's impaneled, your Honor.

THE COURT: Be seated, please.

We received your signal that you've arrived at a verdict, so I'm going to ask the deputy county clerk to proceed to receive your verdict.

THE CLERK: In the case of People of the State of Michigan versus Lantz Howard Washington, will the foreperson please rise.

Has the Jury reached a verdict?

FOREPERSON: Yes, we have.

THE CLERK: Is the verdict unanimous?

FOREPERSON: Yes, it is.

THE CLERK: What is the verdict of the Jury? Please read your form.

FOREPERSON: We, the Jury, find the Defendant Lantz Howard Washington guilty as charged of body armor possession by felon.

THE CLERK: Will the jurors please stand and raise your right hand.

RECEIVED by MSC 12/21/2023 11:06:26 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

The People of the State of Michigan	
Plaintiff-Appellant,	MSC No. 165296
v.	COA No. 353052
Lantz Washington	St. Clair County Circuit Court
Defendant-Appellee.	Case No. 19-002078-FH

Unpublished Opinions cited in:

Defendant-Appellee Lantz Washington's Supplemental Brief

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Date: December 21, 2023

RECEIVED by MSC 12/21/2023 11:06:26 AM

Index of Cases

People v Chalmers, unpublished opinion of the Court of Appeals, issued February 22, 2005 (Docket No. 251974), 2005 WL 415282

People v Delong, unpublished opinion of the Court of Appeals, issued February 11, 2021 (Docket No. 353687), 2021 WL 527402

People v Emerson, unpublished opinion of the Court of Appeals, issued March 20, 2007 (Docket No. 266047), 2007 WL 839444

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RECEIVED by MSC 12/21/2023 11:06:26 AM

2005 WL 415282
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Claude CHALMERS, Defendant-Appellant.

No. 251974.
|
Feb. 22, 2005.

Before: SCHUETTE, P.J., and FITZGERALD and BANDSTRA, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), in case number 03-002667-FH, and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), in case number 03-001857-FH. Defendant was sentenced to 1½ to 20 years in prison for the possession with intent to deliver less than 50 grams of heroin conviction, to be served consecutive to 90 days in jail for the possession of less than 25 grams of cocaine conviction. We affirm defendant's convictions and sentences, but remand for correction of clerical errors contained in the judgments of sentence.

On January 31, 2003, Detective Robert Stanton radioed Officer Thomas Gootjes with a description of defendant's car, and asked Gootjes to stop defendant. Shortly thereafter, Gootjes initiated a traffic stop of defendant for a speeding violation, asked defendant to step out of his car, and received consent to search defendant's person and the car. Officer Adam Baylis arrived as backup, and conducted the search of defendant's person, which did not yield any contraband. During his search of the car, Gootjes observed an envelope on the front passenger seat that contained seven packets of heroin. Gootjes arrested defendant and called Stanton to inform him that defendant was in custody.

Defendant testified to a completely different account of his arrest: according to defendant, four police officers ran up to his car, opened all four doors, and one of the officers pulled him out and handcuffed him before saying anything. Defendant first testified that the police planted the seven packets of heroin in his car, but later testified that it belonged to a prostitute to whom he had given a ride earlier in the day.

Stanton arrived on the scene and asked defendant if he "wanted to help himself out with the case that he had just gotten himself into." According to Stanton, defendant "said something to the effect of, 'I'll do anything, I don't want to go to jail,' " and also referred to "a guy he named Art." Stanton and defendant agreed to meet a few blocks away to discuss the possibility of defendant becoming an informant. Defendant was released from custody, and he and Stanton drove separately to an abandoned parking lot, where they pulled up side-by-side in their cars to talk. Defendant, however, maintains that as soon as Stanton arrived at the scene, he was released from custody and told to follow Stanton. According to defendant, once they arrived at the abandoned parking lot, Stanton informed defendant that "you're now going to work for me."

Stanton testified that he asked defendant who Art was, and that defendant replied that Art was from Detroit, and "was the guy he worked for, made deliveries for." Defendant told Stanton that he drove Art to and from Detroit several times a week to pick up heroin to bring back to Grand Rapids. Defendant had attempted to deliver ten packets of heroin for Art earlier in the day, but the buyer only wanted three, leaving him with seven packets when he was arrested by Gootjes. Defendant indicated that he would have to "come up with" $140 to give Art to cover the seven packets that he had been unable to sell, so that it would look like he had actually sold all of the heroin. Stanton affirmed that defendant was "definitely intent on selling" the heroin, and that it was only a matter of "when." Stanton suggested that he give defendant $140 to give to Art, so that it would look like defendant had sold all ten packets as originally planned, to prevent Art from becoming suspicious.

***2** Stanton then advised defendant about the process of becoming a reliable informant. Stanton interviewed defendant concerning his knowledge of the drug trade, and explained that defendant would have to complete a minimum of

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three supervised "reliability buys" before being considered a reliable informant and being used to apprehend other drug offenders. Stanton made it a point to emphasize that defendant should not go out and purchase drugs on his own, and defendant indicated that he understood. Stanton and defendant then exchanged cell phone numbers, and Stanton instructed defendant to call him at least once a day. At the conclusion of their ten minute conversation, Stanton provided defendant with $140 to give to Art, and followed defendant to Art's house. Art was not there, so defendant proceeded to another possible location. Stanton was well-known in the area where defendant was headed, so he instructed defendant to go pay off Art on his own, and to call Stanton afterward, so that they could start on the reliability buys.

Approximately two hours later, Officer Philip Braate was conducting surveillance, and saw defendant pick up a young male who had been standing on a corner, drive thirty yards, and then drop off the male. Braate suspected that a drug sale had just occurred, and initiated a traffic stop of defendant for failing to wear his seatbelt and for a defective driver's side mirror. Defendant immediately stated that he was "working for Bosco," i.e., Detective Stanton. Braate asked defendant for his driver's license, noticed that defendant's fist was clenched, and asked defendant what was in his hand. Defendant held out a rock of crack cocaine and gave it to Braate. Braate arrested defendant and called Stanton, who stated that defendant had not been making a controlled buy for him at that time. Stanton nevertheless requested Braate to release defendant and instruct defendant to call Stanton as soon as he was released.

Stanton testified that defendant did not call him immediately after he was released by Braate as he had been instructed, but instead called him a day or two later. Stanton attempted to contact defendant several times thereafter: a few times defendant answered and said nothing was going on; two weeks later, another person answered the phone and said that it no longer belonged to defendant. Stanton then obtained two arrest warrants for defendant, who was arrested in Detroit and charged with the crimes in the instant case.

Defendant first argues that his statements to Stanton [1] were inadmissible because they were made during a custodial interrogation and he had not waived his Fifth Amendment right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *Miranda v. Arizona,* 384 U.S. 436, 444; 86 S Ct 1602; 16 L.Ed.2d 694 (1966). Because defendant failed to object below, we review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *People v. Carines,* 460 Mich. 750, 762-764; 597 NW2d 130 (1999).

***3** It is well settled that *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v. Zahn,* 234 Mich.App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is "questioning initiated by [a] law enforcement officer[ ] after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v. Hill,* 429 Mich. 382, 387; 415 NW2d 193 (1987), quoting *Miranda, supra* at 444. Whether an accused was in custody depends on the totality of the circumstances, and the key inquiry is whether the person reasonably believed that he was not free to leave. *People v. Marsack,* 231 Mich.App 364, 374; 586 NW2d 234 (1998). "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Zahn, supra* at 449.

Here, the record does not support a conclusion that defendant was in custody when he revealed information about making deliveries for his supplier: he had been released from custody and was in his own car, voluntarily discussing the possibility of becoming an informant with Stanton. Faced with the option of going to jail and being charged with a drug crime versus the prospect of "help [ing] himself out with the case that he had just gotten himself into" by becoming an informant and possibly avoiding a criminal charge, defendant chose the latter option. In other words, defendant made his incriminating statements while out of custody, to avoid being placed in custody. Defendant cannot now claim a constitutional violation where he took advantage of a situation which did not ultimately inure to his benefit. Defendant has not demonstrated that admission of his incriminating statements amounted to plain, i.e., clear or obvious, error. *Carines, supra* at 763.

Further, even if we were to conclude that defendant's incriminating statements were made while he was in custody without having been advised of his *Miranda* rights, defendant has not met his burden of persuasion regarding prejudice. *Carines, supra* at 763. That is, defendant has not demonstrated that the error affected the outcome of the lower court proceedings. *Id.* There was sufficient evidence, most notably the seven delivery-ready packets of heroin, to convict

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defendant of possession with intent to distribute heroin aside from his statements to Stanton. Therefore, any error in the admission of those statements did not affect defendant's substantial rights, and he is unable to avoid forfeiture of this unpreserved issue. *Id.*

Defendant also argues that defense counsel was ineffective for failing to object to the admission of the statements he made to Stanton. We disagree. Because defendant failed to move for a new trial or for a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v. Sabin (On Second Remand),* 242 Mich.App 656, 658-659; 620 NW2d 19 (2000).

***4** To establish a claim of ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *People v. Pickens,* 446 Mich. 298, 302-303; 521 NW2d 797 (1994). However, it is well settled that defense counsel is not ineffective for failing to make a futile motion. *People v. Fike,* 228 Mich.App 178, 182; 577 NW2d 903 (1998). In light of our determination that defendant's statements to Stanton were properly admissible, we find that defense counsel was not ineffective for failing to object to the admission of such evidence. Defense counsel's performance was not deficient. Further, defendant has not demonstrated that his counsel's allegedly deficient performance prejudiced his defense. As noted above, introduction of the contested statements did not affect the outcome of the proceedings, because there was sufficient evidence aside from them upon which to base the convictions. *Pickens, supra* at 303. Defendant is not entitled to relief on this issue.

Defendant next argues that there was insufficient evidence to support his conviction for possession with intent to deliver less than 50 grams of heroin. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v. Wolfe,* 440 Mich. 508, 515; 489 NW2d 748, amended 441 Mich. 1201 (1992). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime. *People v. Fennell,* 260 Mich.App 261, 270; 677 NW2d 66 (2004). Additionally, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *Id.* at 270-271.

To support a conviction for possession with intent to deliver less than fifty grams of heroin, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is heroin; (2) that the heroin is in a mixture weighing less than 50 grams; (3) that defendant was not authorized to possess the substance; and (4) that defendant knowingly possessed the heroin with the intent to deliver. *Id.* at 516-517. On appeal, defendant only challenges the sufficiency of the evidence regarding the fourth element-that he knowingly possessed heroin with the intent to deliver. See CJI2d 12.3.

Defendant argues that there was insufficient evidence of the corpus delicti of the crime to allow his statements to Stanton to be admitted at trial. We disagree. The corpus delicti rule provides that "a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury ... and (2) some criminal agency as the source of the injury." *People v. Konrad,* 449 Mich. 263, 269-270; 536 NW2d 517 (1995). Sufficient circumstantial evidence of defendant's intent to deliver heroin existed independent of the statements.

***5** Our Supreme Court has held that "actual delivery of narcotics is not required to prove intent to deliver," and that "[i]ntent to deliver [may be] inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe, supra* at 524. Here, the evidence presented at trial demonstrated that defendant possessed heroin that was packaged for sale in individual packets. There was no evidence to suggest that the heroin was possessed simply for personal use-no paraphernalia typically used to ingest heroin was discovered in defendant's car or on defendant's person. These facts provided sufficient circumstantial evidence, independent of defendant's statements, to prove that the crime of possession with intent to deliver less than 50 grams of heroin occurred, thereby satisfying the corpus delicti rule. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt; therefore, defendant is not entitled to relief on this issue.

Defendant next argues that the trial court erred in sentencing him as both a second controlled substances offender, MCL

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333.7413(2), and as a fourth-offense habitual offender, MCL 769.12. Because defendant failed to object to the sentence imposed by the trial court, we review his unpreserved claim of sentencing error for plain error affecting substantial rights. *People v. Sexton,* 250 Mich.App 211, 227-228; 646 NW2d 875 (2002).

This Court has held that "[a]s a specific and comprehensive measure the [controlled substances] act's sentence-augmentation provision controls over the general habitual offender statute." *People v. Edmonds,* 93 Mich.App 129, 135; 285 NW2d 802 (1979). Further, the fourth-offense habitual offender statute provides that "[i]f the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code." MCL 769.12(1)(c). The subsequent offender provision of the controlled substances act allows sentencing to "a term not more than twice the term otherwise authorized." MCL 333.7413(2). Thus, the habitual offender statute does not allow for an increase in the authorized maximum sentence in cases subject to sentence enhancement as a second or subsequent controlled substances offense. Rather, the maximum sentence may be increased by up to twice the maximum provided for the particular controlled substance offense. MCL 333.7413(2).

The authorized punishment for possession with intent to deliver less than 50 grams of heroin is imprisonment for not more than 20 years. MCL 333.7401(2)(a)(iv). The authorized punishment for possession of less than 25 grams of cocaine is imprisonment for not more than 4 years. MCL 333.7403(2)(a)(v). Because defendant was a second controlled substances offender, the trial court had the discretion to sentence defendant to a maximum term of 40 years for the possession with intent to deliver less than 50 grams of heroin conviction, and to a maximum term of 8 years for the possession of less than 25 grams of cocaine conviction. However, the trial court sentenced defendant to 1½ to 20 years in prison for the possession with intent to deliver less than 50 grams of heroin conviction, MCL 333.7401(2)(a)(iv), to run consecutive to his sentence to 90 days in jail for the possession of less than 25 grams of cocaine conviction, MCL 333.7403(2)(a)(v). Although the judgments of sentence indicate that defendant was sentenced as both a second controlled substances offender and as a fourth-offense habitual offender, a review of the sentence actually imposed reveals that the trial court did not exercise its discretion to enhance defendant's maximum sentence.

***6** Defendant has failed to demonstrate plain error affecting his substantial rights; therefore, he is not entitled to relief on this unpreserved issue. However, although we affirm defendant's convictions and sentences, we remand for correction of the judgments of sentence and direct that the references to enhancement under the fourth-offense habitual offender statute, MCL 769.12, and the second controlled substances offender statute, MCL 333.7413(2), be deleted.

Finally, defendant argues that remand is appropriate to correct a clerical error in the judgment of sentence. Defendant was convicted of possession with intent to deliver less than 50 grams of heroin, a controlled substance classified in schedule 1, MCL 333.7212. However, the judgment of sentence indicates that defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, a drug described in MCL 333.7214(a)(iv). In any event, both offenses fall under MCL 333.7401(2)(a)(iv), and on remand, the trial court must correct the judgment of sentence to reflect the crime of which defendant was actually convicted, i.e., possession with intent to deliver less than 50 grams of heroin.

We affirm defendant's convictions and sentences, but remand for deletion of all references to enhancement under the fourth-offense habitual offender statute, MCL 769.12, and second controlled substances offender statute, MCL 333.7413(2), as well as for correction of the controlled substance regarding which defendant was actually convicted under MCL 333.7401(2)(a)(iv), i.e., heroin. We do not retain jurisdiction.

All Citations

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Footnotes

1 Our analysis applies only to the statements defendant made to Stanton in the parking lot where they met after defendant was released from the Gootjes arrest. His earlier statements-"I'll do anything, I don't want to go to jail," and the reference, without any context given, to "a guy ... named Art"-were not inculpatory.

2 *People v. Ginther,* 390 Mich. 436, 443; 212 NW2d 922 (1973).

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2021 WL 527402
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Tyler Thomas DELONG, Defendant-Appellant.

No. 353687
|
February 11, 2021

Chippewa Circuit Court, LC No. 20-004047-FC

Before: Beckering, P.J., and Sawyer and Shapiro, JJ.

Opinion

Per Curiam.

***1** In this interlocutory appeal, defendant appeals the circuit court's order denying his motion to quash the charges of attempted murder, MCL 750.91, assault with intent to commit murder, MCL 750.83, first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f), and unlawful imprisonment, MCL 750.349b, on which he was bound over from the district court. We affirm.

I. FACTUAL BACKGROUND

On August 2, 2019, at approximately 3:20 a.m., officers responded to a call for a reported assault. The responding officer found Gavin Schroeder bleeding heavily from his face with MC steadying him. MC explained that defendant, who had been staying with her for a few days, had been acting strangely and would not let her leave her house. She described that when she texted Schroeder for help, defendant became angry, raped her, and began beating her. She explained that Schroeder broke down the door and pepper sprayed defendant, and that defendant attacked him with a knife, stabbed him, and strangled him. Schroeder and MC were taken to the hospital for treatment. Officers made contact with defendant, who was waiting outside the residence. Defendant explained in detail that he sexually assaulted MC, beat her, and fought Schroeder. He explained that he aimed for Schroeder's intestines and kidneys with the knife, and said that his only thought at the time was to kill Schroeder.

At the preliminary examination, the prosecutor entered into evidence without objection Schroeder's and MC's medical records from the hospital, a CT scan of Schroeder, and body cam footage of the officer's contact with Schroeder, MC, and defendant. The hospital records indicated that Schroeder had been assaulted by a male assailant, that he had been stabbed and suffered blows to the head, neck, and face, and that MC had been sexually and physically assaulted by a male assailant known to her. The CT scan showed that Schroeder had a broken knife blade embedded in his left sinus. Neither Schroeder nor MC testified at the preliminary exam, but the responding officer testified. The district court found that the evidence and testimony established probable cause to bind defendant over on charges of attempted murder, assault with intent to commit murder, CSC-I, and unlawful imprisonment. However, the court found that without testimony from MC, it did not have enough evidence to bind defendant over on charges of kidnapping, assault with intent to cause great bodily harm less than murder, and assault with a dangerous weapon.

In the circuit court, defendant moved to quash the bindover on the ground that the prosecutor had failed to satisfy the *corpus delicti* rule. The circuit court denied defendant's motion, and this appeal followed.

II. ANALYSIS

Defendant argues that the district court abused its discretion by binding defendant over for trial because the prosecutor did not satisfy the *corpus delicti* rule. We disagree.

We review a lower court's decision regarding the *corpus delicti* requirement for an abuse of discretion. *People v. Burns*, 250 Mich. App. 436, 438; 647 N.W.2d 515 (2002). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *People v. Olney*, 327 Mich. App. 319, 325; 933 N.W.2d 744 (2019). We also review for abuse of discretion a district court's decision to bind a defendant over to the circuit court for trial. *Id.*

***2** "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that

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did not occur." *People v. Konrad*, 449 Mich. 263, 269; 536 N.W.2d 517 (1995). Under the rule, a defendant's confession may only be admitted into evidence "when the prosecutor presents direct or circumstantial evidence, independent of the confession, establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury." *People v. Cotton*, 191 Mich. App. 377, 394; 478 N.W.2d 681 (1991). The *corpus delicti* rule must be shown by a preponderance of the evidence. *Burns*, 250 Mich. App. at 438. "Once this showing is made, a defendant's confession may be used to establish identity, intent, or aggravating circumstances." *Cotton*, 191 Mich. App. at 394.

Defendant first argues that the prosecution did not satisfy the *corpus delicti* rule because it presented only hearsay evidence. We disagree. The only case cited by defendant in support of his argument that hearsay evidence cannot be used to establish the corpus delicti is an unpublished opinion of this Court, *People v. Bigelow* (No. 306435, issued 3/19/2013). Not only is *Bigelow* not binding precedent, MCR 7.215(C)(1), it also fails to support defendant's argument. *Bigelow* recited the facts of that case, including that the prosecutor had presented eyewitness testimony used to establish the corpus delicti. Nothing in the opinion suggests that hearsay evidence, if otherwise admissible, cannot be used as well to establish the corpus delicti.[1] Although this Court's own research did not discover a case that addressed the question of the use of hearsay to establish the corpus delicti at a preliminary examination, our opinion in *Olney*, 327 Mich. App. at 329-331, recognized that hearsay evidence, if admissible, can be the basis to establish probable cause at a preliminary examination.[2] We see no reason to conclude that, if admissible hearsay can be used to establish probable cause at the preliminary examination, admissible hearsay cannot be used to establish the corpus delicti at a preliminary examination.

Thus, the relevant question is whether the evidence used to establish the corpus delicti was, in fact, hearsay and, if so, was it nevertheless admissible. But defendant cites no authority in support of his argument that the evidence was, in fact, inadmissible hearsay. Indeed, the medical records, Schroeder's CT scan, and the body cam recordings were all admitted into evidence without objection. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority." *Cheesman v. Williams*, 311 Mich. App. 147, 161; 874 N.W.2d 385 (2015). In this case, the medical records and body cam recordings provided sufficient evidence to establish injury and criminal agency without the in-court testimony of Schroeder or MC.

This admissible evidence established specific injuries and criminal agency as the source of the injuries independent of defendant's confession to the officers. The hospital records alone established that Schroeder and MC sustained specific injuries, including MC's sexual assault and Schroeder's neck injury and stab wounds to the face and arm. The narrative section of the hospital record established that there was a criminal source of the injuries, because it identified that a male assailant, known to MC, was the perpetrator of both attacks. The body cam recordings also established that MC and Schroeder had sustained injuries from defendant's actions because MC described in detail how defendant had beaten her, sexually assaulted her, stopped her from leaving, and attacked Schroeder. This allowed the prosecutor to present evidence of defendant's confession to establish his intent to kill Schroeder, which in turn allowed the district court to elevate the charges to attempted murder and assault with intent to commit murder. *Cotton*, 191 Mich. App. at 394.

***3** Defendant also argues that the district court's decision to not bind him over on some charges contradicted its decision to bind him over on others. We disagree. The district court outlined the evidence that supported its decision to bind defendant over on certain charges. The medical records established that Schroeder suffered a severe injury as the result of an assault, which allowed the prosecutor to introduce defendant's confession to establish his intent and elevate the charges to attempted murder and assault with intent to murder. *Cotton*, 191 Mich. App. at 394. MC's hospital records and her account on the body cam recording established that defendant sexually assaulted her and that defendant would not let her leave her house. Therefore, regardless of the district court's decision regarding the other charges, the court did not abuse its discretion by binding defendant over for trial on charges of attempted murder, assault with intent to murder, CSC-I, and unlawful imprisonment.

Affirmed.

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Footnotes

1 In fact, while not entirely clear, the facts stated in the opinion would seem to suggest that some hearsay evidence was used, namely the medical examiner's report. *Slip op.* at 2.

2 *Olney* involved hearsay evidence of a domestic violence victim admitted under MCL 768.27c in lieu of the victim's testifying at the preliminary examination.

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2007 WL 839444
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Paul EMERSON, Defendant-Appellee.

Docket No. 266047.
|
March 20, 2007.

Wayne Circuit Court; LC No. 05-001079-01.

Before: O'CONNELL, P.J., and SAAD and TALBOT, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant pleaded guilty to carrying a concealed weapon in a vehicle, MCL 750.227, and the trial court sentenced him to three months in jail, or, in the alternative, an $800 fine. Thereafter, defendant filed a motion to withdraw his guilty plea and the trial court granted the motion. The trial court then granted defendant's motion to dismiss the case. The prosecutor appeals, and we reverse and remand for further proceedings.

I. Facts

Testimony from defendant's preliminary examination shows that defendant drove his vehicle from his home to his place of business with a loaded pistol in the front console. A Federal Bureau of Investigation agent saw defendant pull into the parking lot of the business because the agents were waiting to execute a search warrant of defendant's vehicle and business regarding another matter. After the agents found the loaded gun, defendant admitted that he had driven from his home to the business with the loaded pistol in his vehicle. Defendant had applied for, but was denied a permit to carry a concealed weapon. Accordingly, defendant was not authorized to carry a concealed weapon in his vehicle. [1]

Defendant was charged with carrying a concealed weapon pursuant to MCL 750.227(2), which states, in relevant part:

> (2) A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, *without a license to carry the pistol as provided by law....* (Emphasis added.)

Defendant filed a motion to dismiss and argued that the statute contains an exemption for those who carry a pistol in a vehicle at their place of business or on land they possess. Defendant maintained that the exemption applies because his pistol was in his unoccupied vehicle parked in the lot of his leased business premises. The trial court ultimately agreed and dismissed the case.

II. Analysis

The prosecution contends that the trial court erred because the magistrate properly bound over defendant for trial and the trial court erroneously permitted defendant the protection of the exemption in MCL 750.227(2). We agree. [2]

The prosecution asserts that the correct inquiry is not whether defendant lawfully possessed the gun at the time of the search, but whether the prosecution proved that defendant, at some point, possessed the weapon in a motor vehicle on land not possessed by him. The prosecutor maintains that he proved this at the preliminary examination when he elicited testimony from an agent who stated that defendant admitted he drove his vehicle from his home to his clinic and he was aware that the gun was in the vehicle. Also, testimony established that the agents saw defendant drive his vehicle into the parking lot, presumably from the road.

To establish the offense of carrying a weapon in a vehicle, the prosecution must show: (1) the presence of a weapon in

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a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of the presence of the weapon, and (3) that the defendant was carrying the weapon. *People v. Nimeth,* 236 Mich.App 616, 622; 601 NW2d 393 (1999). A defendant is deemed to "carry" the pistol if it is readily accessible to him. *Nimeth, supra* at 619-620.

***2** The prosecution established the elements of the offense by showing that defendant drove from his home to his clinic with knowledge that there was a pistol in the console of his vehicle. The fact that the agents did not witness defendant driving from his home to his place of business does not mean that no crime was committed. It is more than reasonable to assume that defendant pulled in to the parking lot from the road, and he essentially admitted as much when he disclosed that he drove from his house to the business. There is no requirement that a police officer personally witness the crime in order for there to be probable cause to bind over a defendant. Defendant's statement, coupled with the agent's testimony that he saw defendant pull into the parking lot, were sufficient to lead the magistrate to conclude that there was probable cause to believe that defendant violated MCL 750.227. *People v. Glass (After Remand),* 464 Mich. 266, 277; 627 NW2d 261 (2001); *People v. McGee,* 258 Mich.App 683, 696; 672 NW2d 191 (2003).

Defendant argues, erroneously, that the exemption allowing a business owner to carry a pistol on his business premises or on other land that he possesses implicitly authorized him to do what was necessary to bring the gun to the premises. Again, however, defendant violated the plain language of MCL 750.227(2) by driving on the public roads with a pistol in the console of his car. MCL 750 .231a provides that MCL 750.227(2) does not apply "to a person while transporting a pistol for a lawful purpose." And, this may include transporting a pistol to the person's place of business. Yet, for the exception to apply, the pistol must be "unloaded in a closed case designed for the storage of firearms in a vehicle that does not have a trunk and is not readily accessible to the occupants of the vehicle."[3] MCL 750.231a(2)(b)(ii); MCL 750.231a(1)(e). Here, defendant's pistol was loaded, not in a closed case, and readily accessible to him in the front console of his vehicle. In delineating how a weapon may be transported, the Legislature sought to protect those in and outside the vehicle from the dangers associated with loaded firearms. *People v. Quinn,* 440 Mich. 178, 194; 487 NW2d 194 (1992). Therefore, defendant's argument that he had a lawful purpose for driving with a pistol, is unavailing.

Defendant further avers that the corpus delicti rule precludes the prosecution from using against him his statement that he drove from his home with the gun in his car. The charge against defendant is not barred by the corpus delicti rule because there is independent evidence of defendant's guilt. One of the agents who executed the search warrant observed defendant pull into the parking lot of the business, presumably from the road. Also, the search of the car revealed a loaded pistol in the front console. Thus, there was independent evidence tending to show that defendant committed the offense.

Defendant also argues that the charging documents involved in his case were defective. Specifically, defendant maintains that, because the complaint, warrant, and information all state that the place of offense is defendant's business, the prosecution is precluded from charging defendant with a crime that allegedly occurred on the road from defendant's home to his business. To the extent that this variance constitutes a defect, it is not so meaningful as to warrant dismissal of the case. The complaint, warrant, and information state, "[defendant] did carry a dangerous weapon, to wit: handgun, whether concealed or otherwise in a vehicle operated or occupied by said defendant, to wit: 1999 Chevrolet Tahoe; contrary to MCL 750.227." Each document further states the date of the offense and the city and county where it occurred. For these reasons, the factual allegations in the information and complaint were clearly sufficient because they adequately informed defendant of the substance of the accusations. *People v. Higuera,* 244 Mich.App 429, 447-448; 625 NW2d 444 (2001); MCR 6.101.

***3** Reversed and remanded further proceedings. We do not retain jurisdiction.

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Footnotes

1 Had defendant held a license to carry a concealed pistol, he would be authorized to carry it "in a vehicle, whether concealed or not concealed, anywhere in this state," subject to various exceptions. MCL 28.425c(2)(b). Further, the prohibition under MCL 750.227(2) does not apply "[t]o a person holding a valid license to carry a pistol concealed upon his or her person issued by his or her state of residence except where the pistol is carried in nonconformance with a restriction appearing on the license." MCL 750.231a(1)(a).

2 A magistrate's ruling that alleged conduct falls within the scope of a criminal law is a question of law which is reviewed de novo for error, while a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. *People v. Schaefer,* 473 Mich. 418, 427; 703 NW2d 774 (2005), mod on other grounds *People v. Derror,* 475 Mich. 316, 320 (2006). This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v. Jones,* 252 Mich.App 1, 4; 650 NW2d 717 (2002). An abuse of discretion standard acknowledges that there will be circumstances in which there will no single correct outcome; rather, there will be more than one reasonable and principled outcome. *People v. Babcock,* 469 Mich. 247, 269; 666 NW2d 231 (2003). When the trial court selects one of these principled outcomes, it has not abused its discretion. *Id.*

3 Defendant's vehicle, being a 1999 Chevrolet Tahoe, does not have a trunk.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Jerry Joe GILDNER, Defendant-Appellant.

No. 354288
|
April 22, 2021

Charlevoix Circuit Court, LC Nos. 20-000034-FH; 20-000035-FH

Before: Murray, C.J., and Markey and Letica, JJ.

Opinion

Per Curiam.

***1** In this interlocutory appeal, defendant appeals by leave granted [1] the circuit court's orders denying in part his motion to quash the information and denying his motion for reconsideration. The district court bound defendant over to the circuit court on 31 counts of using a computer to commit a crime, MCL 752.796, 30 counts of surveilling an unclothed person, MCL 750.539j, and one count of human trafficking, MCL 750.462d(b); MCL 750.462f(1)(b); MCL 750.159f(a). The circuit court rejected defendant's attempt to dismiss the charges except with respect to two counts of surveilling an unclothed person and two counts of using a computer to commit a crime. We affirm.

I. BACKGROUND

Shortly after marrying his wife in 2012, defendant began pressuring her to engage in sexual intercourse with other men. When she eventually relented, defendant started arranging for men to come to his home and have sex with his wife while defendant would remain in another room. Defendant recorded some of these sexual encounters and posted the videos on pornographic websites. Defendant's wife testified at the preliminary examination that defendant told her that he received financial compensation for posting the videos. She further testified that she had a child, that defendant was not the father of the child, and that defendant threatened to withhold financial support from her and the child if she refused to engage in sexual intercourse with other men. In January 2017, defendant and his wife moved to Tennessee. The police executed a search warrant for defendant's Tennessee home and seized from computer equipment found in the home videos of defendant's wife having sex with other men. One of the men whom defendant had videotaped having sexual intercourse with defendant's wife testified that he did not know that defendant was filming him and the sex act. On the basis of what was observed in the videos, the police believed that many other men were also unaware that they were being videotaped.

When testimony at defendant's preliminary examination concluded, the parties agreed that the district court judge would privately view the 30 videos that had been admitted into evidence before making a ruling. But the judge retired before this task could be completed; consequently, the case was assigned to a new judge. The successor judge watched a video recording of the preliminary examination, read the transcript of the preliminary examination, and watched the 30 videos before binding defendant over on all charges. In the circuit court, defendant moved to quash the information and dismiss the charges. The circuit court granted the motion with respect to two counts of surveilling an unclothed person and the two corresponding counts of using a computer to commit a crime, but the court denied the motion with regard to all the remaining charges. Defendant moved for reconsideration, and the circuit court denied the motion. This appeal followed.

II. DISCUSSION

***2** Defendant first argues that his due-process rights were violated because the district court judge who made the bindover decision was not the same judge who had presided over the preliminary examination. Defendant complains that the successor judge was forced to rely on review of the video recording and transcripts of the preliminary examination instead of assessing the evidence and the credibility of witnesses in person, which was necessary to protect defendant's constitutional rights. The circuit court ruled that defendant waived review of this issue. We agree.

An alleged violation of a criminal defendant's due-process rights presents a constitutional question that is reviewed de

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novo. *People v. Wilder*, 485 Mich. 35, 40; 780 N.W.2d 265 (2010). "This Court has defined 'waiver' as the intentional relinquishment or abandonment of a known right." *People v. Kowalski*, 489 Mich. 488, 503; 803 N.W.2d 200 (2011) (quotation marks and citation omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v. Buie*, 491 Mich. 294, 306; 817 N.W.2d 33 (2012) (quotation marks and citations omitted). "Defense counsel cannot acquiesce to the court's handling of a matter at trial, only to later raise the issue as an error on appeal." *Id.* at 312 (quotation marks and citations omitted). A party is not permitted to assert as error on appeal an issue that the party deemed proper below because doing so would allow the party to harbor error as an appellate parachute. *Hoffenblum v. Hoffenblum*, 308 Mich. App. 102, 117; 863 N.W.2d 352 (2014); *Bates Assoc., L.L.C. v. 132 Assoc., L.L.C.*, 290 Mich. App. 52, 64; 799 N.W.2d 177 (2010). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *Kowalski*, 489 Mich. at 503.

There is nothing in the record to suggest that defendant raised any objections or expressed any dissent with respect to the successor judge taking over the preliminary examination and ruling on whether to bind defendant over to the circuit court. Furthermore, when the successor judge resumed the preliminary examination, she noted that the previous judge had set aside three hours for additional testimony and asked if the parties wished to present more testimony. The prosecution responded that the actual purpose of those three hours was to afford the court the opportunity to ask any additional questions, and defense counsel acknowledged that the prosecution's characterization was "hundred percent true." Defense counsel noted, however, that he had been given a mountain of information by the prosecutor a day earlier that justified additional testimony. Defense counsel stated:

> In light of that information I think that additional testimony from the complaining witness in this case would assist the court in making the bind over decision so I would ask for that opportunity on that basis, although that is not what was intended when we made the agreement, but I couldn't have known about this information because I didn't have it then.

The parties then engaged in extensive argument regarding the need or propriety of having defendant's wife retake the stand and continuing the preliminary examination. The record thus revealed that defendant specifically asked *the successor judge* to preside over a continuation of the preliminary examination. And after the successor judge declined to reopen the proofs, the parties presented their arguments against and in favor of binding defendant over on the charges. In the process, defense counsel specifically requested that *the successor judge* render a bindover ruling. Under these circumstances, we hold that defendant intentionally relinquished and abandoned any right to later challenge the involvement or participation of the successor judge in the preliminary examination. To rule otherwise would allow defendant to harbor error as an appellate parachute. Moreover, defendant has failed to show that he was in any way prejudiced by the continuance of the preliminary examination before the successor judge. See *People v. Bell*, 209 Mich. App. 273, 275; 530 N.W.2d 167 (1995) (applying harmless error to the substitution of a new judge during jury deliberations).

***3** Defendant next argues that the district court abused its discretion by finding that the prosecution presented sufficient evidence to bind defendant over on the human trafficking charge and the corresponding count of using a computer to commit a crime. We disagree. In *People v. Henderson*, 282 Mich. App. 307, 312-313; 765 N.W.2d 619 (2009), this Court discussed the law regarding preliminary examinations, observing as follows:

> The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. Probable cause that the defendant has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. Circumstantial evidence and reasonable inferences from the evidence can be sufficient. If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial, where the questions can be resolved by the trier of fact.

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> A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. In reviewing the bindover decision, a circuit court must consider the entire record of the preliminary examination and may not substitute its judgment for that of the district court. The decision to bind over a defendant may only be reversed if it appears on the record that the district court abused its discretion. This Court also reviews the bindover decision de novo to determine whether the district court abused its discretion. Thus, this Court gives no deference to the circuit court's decision. [Citations omitted.]

The charge of human trafficking required proof that defendant knowingly benefited financially from participation in a criminal enterprise that resulted in an individual being engaged in commercial sexual activity. MCL 750.462d(b); MCL 750.462f(1)(b); MCL 750.159f(a). Defendant's argument on appeal is that the prosecution did not present sufficient evidence showing that defendant benefited financially as required by MCL 750.462d(b). Defendant's wife testified that defendant told her that he received money in exchange for posting the sex videos on the Internet. This evidence was sufficient to support a finding of probable cause that defendant benefited financially. But defendant argues that the testimony by defendant's wife regarding the financial benefit defendant received was admitted in violation of the *corpus delicti* rule. In *People v. Schumacher*, 276 Mich. App. 165, 180-181; 740 N.W.2d 534 (2007), this Court explained the *corpus delicti* rule:

> In a criminal prosecution, proof of the *corpus delicti* of a crime is required before the prosecution may introduce a defendant's inculpatory statements. The *corpus delicti* rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur. Under the *corpus delicti* rule, a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. Proof of the identity of the perpetrator of the crime is not part of the *corpus delicti*. Moreover, the *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt. If the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission. [Citations, quotation marks, and ellipses omitted.]

***4** The *corpus delicti* rule does not require independent proof of every element of a crime. *People v. Williams*, 422 Mich. 381, 391; 373 N.W.2d 567 (1985).

Once again, defendant's wife testified that defendant told her that he received money for uploading the videos depicting sex acts. Establishing that defendant received money to upload the pornographic videos was not alone sufficient to prove that defendant was guilty of human trafficking—far from it. The prosecution also relied on the videos and defendant's wife's testimony that defendant pressured her to engage in sexual activity with other men and threatened to withhold financial support if she did not comply. Because additional evidence was required to establish probable cause that defendant committed the offense of human trafficking, the alleged statement by defendant about receiving a financial benefit constituted a mere admission and not a confession of guilt. Therefore, the *corpus delicti* rule was not violated. *Schumacher*, 276 Mich. App. at 180. Defendant's admission related to only one element of the crime, and the *corpus delicti* rule does not require independent proof of every element. *Williams*, 422 Mich. at 391.

Defendant next contends that the district court's bindover decision was based on inadmissible hearsay evidence. Defendant fails to identify the testimony that was purportedly barred by the hearsay rule and fails to engage in any discussion of the law governing hearsay. Accordingly, review of this issue has been waived or abandoned. See *People v. Matuszak*, 263 Mich. App. 42, 59; 687 N.W.2d 342 (2004). Nevertheless, assuming that the hearsay claim concerns the testimony by defendant's wife that defendant stated that he

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received a financial benefit for uploading the videos, we find that the testimony was not hearsay because defendant's statement constituted an admission by a party-opponent. MRE 801(d)(2)(A).

Finally, defendant argues in cursory fashion that his constitutional right to confront witnesses against him was violated because the successor judge relied on a video of the preliminary examination in binding defendant over to the circuit court. We quickly dispense of this illogical argument. At the preliminary examination, defendant cross-examined the prosecution's three witnesses, and the successor judge's review of their testimony by videotape did not implicate further rights of confrontation. Reversal is unwarranted.

We affirm.

All Citations

Not Reported in N.W. Rptr., 2021 WL 1588834

Footnotes

1 *People v. Gildner*, unpublished order of the Court of Appeals, entered September 29, 2020 (Docket No. 354288).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Theron Phone HUNT, Defendant-Appellant.

No. 352862
|
August 19, 2021

St. Joseph Circuit Court, LC No. 19-022635-FC

Before: Stephens, P.J., and Beckering and O'Brien, JJ.

Opinion

Per Curiam.

***1** This case arises out of an armed robbery that turned fatal. Defendant, Theron Phone Hunt, appeals as of right his jury trial convictions for felony murder, MCL 750.316(1)(b); two counts of armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; criminal sexual conduct in the second degree (CSC-II), MCL 750.520c(1)(c) (sexual contact during commission of another felony); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to life without the possibility of parole for felony murder; 30 to 70 years' imprisonment for each armed robbery count; 10 to 30 years' imprisonment for unlawful imprisonment; 10 to 30 years' imprisonment for CSC-II; and two years' imprisonment for felony-firearm.

On appeal, defendant argues (1) that the trial court improperly instructed the jury to infer malice from the underlying felony and that defense counsel was ineffective for failing to object; (2) that defendant did not have the requisite malice for felony murder; (3) that the trial court abused its discretion by not granting a mistrial; and (4) that the prosecutor engaged in misconduct by misstating the law during closing arguments. Defendant also argues in a Standard 4 brief[1] that the district court abused its discretion when it bound over defendant on Count 2, armed robbery of Kevin Johnson, and that prosecutor had not established the *corpus delicti* of that offense at the preliminary examination. For the reasons set forth in this opinion, we affirm.

I. BASIC FACTS

In November 2018, Johnson and his girlfriend, Heather Little, contacted Staniela King seeking to buy methamphetamine. King then contacted defendant to see if she could get $200 worth of methamphetamine for Johnson. Defendant and King communicated through Facebook, and defendant agreed to provide the methamphetamine.

Before the delivery, defendant was using methamphetamine with Kayla Cheney and Tyler McNeil. Defendant informed McNeil that he planned to conduct a fake drug sale and swindle King. Defendant told McNeil and Cheney to come with him, and he instructed McNeil to bring a shotgun.[2]

Defendant, Cheney, and McNeil arrived at King's house at 1:14 a.m. Cheney had mace and McNeil had the shotgun. Once they were in King's house, defendant nodded to Cheney, and Cheney sprayed mace at King. Defendant then grabbed King, and McNeil put the gun to her face. Cheney and later McNeil bound King with duct tape, and the group proceeded to "ransack" the house, packing things and putting them in their car. During the robbery, defendant pinched King's vagina while she was taped up and made comments about sexually assaulting her. After the group packed up King's belongings, they quieted down, unscrewed a light bulb, and waited for Johnson.

***2** When Johnson arrived and walked into King's house, defendant pointed the gun at him. Defendant asked Johnson where the money was, and Johnson told him it was in his truck. Defendant handed the gun to one of the other assailants and went to Johnson's truck. Testimony is conflicting as to who defendant originally handed the gun to, but it ultimately ended up in Cheney's hands. Johnson attempted to get up or lunge toward Cheney, and Cheney shot and killed him.[3] At Johnson's truck, defendant encountered Little and threatened to cut her throat if she did not give him the money. Defendant then took money and a cell phone from Johnson's truck. Cheney and McNeil ran out of the house to the car; defendant

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joined them and they fled. Defendant instructed McNeil to throw the shotgun in the woods, and he burned McNeil's bloodstained clothes.

Defendant was later arrested by police. When St. Joseph County Sheriff's Sergeant Brandon Dahl processed defendant's vehicle, there were many stolen items from King's residence as well as Johnson's cell phone in the vehicle. Defendant subsequently directed police to the shotgun. He admitted to Cass County Sherriff's Detective Chad Spence that they went to King's residence to conduct a fake drug deal, but he put most of the blame on McNeil and Cheney. He claimed they were the ones who packed King's belongings into the car. Defendant stated that when Johnson came in, he went to the truck and took the money and a cell phone.

Defendant was convicted and sentenced as stated earlier, and he now appeals as of right.

II. ANALYSIS

A. FELONY MURDER JURY INSTRUCTION

Defendant first argues that the trial court improperly instructed the jury regarding felony murder. Specifically, defendant asserts that the jury was erroneously instructed to infer malice from the underlying felony, armed robbery. However, in this case, defendant approved the final jury instructions. Where defense counsel expressly approves the jury instructions given by a trial court, the defendant has waived any error with regard to those instructions. See *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018). Therefore, defendant's challenge to the jury instructions is waived. See *id.* However, defendant concurrently argues that defense counsel was ineffective for failing to object to the jury instructions. We disagree.

Generally, whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. See *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). This Court reviews constitutional questions de novo and a trial court's factual determinations for clear error. *Id.* A factual finding is clearly erroneous if this Court is "left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). This Court's review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The jury instructions must contain the elements of the crime and must allow the jury to consider material issues, defenses, or theories if there is evidence to support them. *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014).

Felony murder is defined as murder committed in the perpetration of, or attempt to perpetrate, one of many enumerated crimes, including robbery. MCL 750.316(1)(b). Our Supreme Court has held that a defendant must also have committed the underlying felony with malice. *People v Dumas*, 454 Mich 390, 397; 563 NW2d 31 (1997). Malice requires a defendant to have one of the following three intents: (1) the intent to kill; (2) the intent to do great bodily harm; or (3) a wanton and willful disregard of the likelihood that the natural tendency of the defendant's act is to cause death or great bodily harm. *Id.* at 398. A "jury may infer a malicious intent from the facts and circumstances of the underlying felony." *Id.*

***3** In this case, defendant was charged on an aiding-and-abetting theory. See MCL 767.39. The elements for aiding and abetting are (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "An aider and abettor's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event." *Id.* at 474.

Relying on *Dumas*, defendant argues that the trial court erred when it instructed the jury that it may infer malice from the underlying felony. In *Dumas*, the defendant was charged with felony murder with armed robbery as the underlying felony, and the Court examined the following jury instruction:

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> If you find that the defendant consciously intended to commit, attempted to commit or assist others in the commission of the crime of robbery or larceny, you *may infer* that he knowingly created a high risk of death or serious bodily injury with knowledge that it probably would cause death. [*Dumas*, 454 Mich at 401.]

The Court concluded that the instruction, examined in isolation, is erroneous because "the jury could conclude that it *may infer* defendant's intent to create a high risk of death or great bodily harm with the knowledge that death was the likely result from the intent to commit the underlying crime *alone*, even if the facts and circumstances of the crime did not support that finding." *Id.* at 402. And it would allow the jury "to convict [a] defendant for murder without finding that he had a malicious state of mind when he committed the crime." *Id.* The Court explained that this instruction should not be used unless it is followed up with further clarifying instructions. *Id.* The *Dumas* Court held,

> Where the trial court decides to give an instruction that the jury may infer malice from the commission of an underlying crime, it should further explain at the same time that the jury may only infer this malice if the facts and circumstances of the intent to commit the underlying crime warrant the inference. [*Id.* at 408.]

In the instant case, the trial court never instructed the jury that it may infer malice from the commission of the underlying felony. Therefore, the trial court was not required to further explain the inferred intent as required by *Dumas*. See *id.* Instead, the trial court properly stated, "The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence." The trial court properly instructed the jury as to the intent required:

> In Count 1 first degree felony murder the defendant is charged with first degree felony murder. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant caused the death of Kevin Johnson; that is, Kevin Johnson died as a result of a gunshot wound.
>
> Second, that the defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to Kevin Johnson, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.
>
> Third, that when he did the act that caused the death of Kevin Johnson the defendant was committing or attempting to commit or helping someone else commit the crime of armed robbery.

***4** Nowhere did the trial court state that the jury *may infer* malice from the underlying felony. Moreover, the above instruction mirrors the model jury instructions for first-degree felony murder. M Crim JI 16.4. Therefore, the trial court properly instructed the jury regarding malice, and no further instruction was necessary.

To be entitled to a new trial for ineffective assistance of counsel, a defendant must show: (1) deficient assistance, meaning counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) prejudice, which means there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Trakhtenberg*, 493 Mich at 51. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In this case, defense counsel was not required to make a meritless objection to the jury instructions. See *id.* Also, because defendant has failed to establish any prejudice from the failure to object to proper instructions, defendant's claim of ineffective assistance must fail. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

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B. SUFFICIENT EVIDENCE OF FELONY MURDER

Defendant next contends that there was insufficient evidence presented at trial for the jury to find the elements of first-degree felony murder proved beyond a reasonable doubt. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). "We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id.*

> To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).]
>
> In order to satisfy the malice standard required under *People v Aaron*, 409 Mich 672, 299 NW2d 304 (1980), the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. [*Id.* at 140-141.]

"Further, if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *Id.* at 141.

"[E]vidence of defendant's specific intent to commit a crime or knowledge of the accomplice's intent constitutes sufficient *mens rea* to convict under our aiding and abetting statute." *People v Robinson*, 475 Mich 1, 6-7; 715 NW2d 44 (2006). "[O]ne who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal." *Id.* at 14.

> ***5** Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*Id.* at 15.]

An aider and abettor's state of mind may be inferred from all the facts and circumstances surrounding the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Factors to consider include a close association between the principal and the defendant, the defendant's participation in the planning or execution of the crime, and evidence of flight following the crime. *Id.* at 757-758. Malice, for purposes of proving felony murder, can be inferred from the use of a deadly weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

In *Bulls*, 262 Mich App at 624, this Court upheld the defendant's conviction for felony murder in a similarly egregious factual scenario. The defendant in *Bulls* planned to rob a man who propositioned him for sex. *Id.* at 622. The defendant recruited the help from one of his friends, "D-Mack." *Id.* The defendant asked D-Mack if he had "some heat" to bring, and D-Mack grabbed a shotgun. *Id.* When the two arrived at the victim's house, they forced their way in, pointing the shotgun at the victim. *Id.* The defendant then searched the victim's house for valuables, while D-Mack took the victim to a bedroom. *Id.* The defendant then heard a shotgun blast and saw that the victim was lying dead at the bottom of the stairs. *Id.* at 622-623. D-Mack told the defendant that he shot the victim because the victim tried to run. *Id.* at 623. On appeal, the defendant argued that there was insufficient evidence to convict him of felony murder. *Id.* at 624.

This Court upheld the defendant's conviction and concluded that the evidence was sufficient to establish defendant's malice. *Id.* at 625. This Court reasoned that the "defendant

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instigated the criminal transaction by going to D-Mack's house, inviting him to participate in the robbery, and encouraging D-Mack to use a dangerous weapon during the robbery." *Id.* at 626-627. "Although the evidence did not show that defendant handled the weapon, he nevertheless 'used' the weapon, with D-Mack's help, to perpetrate the crime and such 'use' also supports an inference of malice." *Id.* at 627. "Although defendant's knowledge of D-Mack's intent to kill the victim would, in itself, show that defendant was acting with wanton and wilful disregard, the jury could infer defendant's malice independent of his knowledge of D-Mack's intent." *Id.* (quotation marks and citation omitted).

Similar to *Bulls*, in this case, defendant orchestrated the armed robbery with the help of Cheney and McNeil, who had both used methamphetamine. See *Carines*, 460 Mich at 757. Defendant then initiated the violence by nodding and telling Cheney to "mace" King. Not only was it defendant's idea to bring the gun, but Cheney, McNeil, and King all testified that defendant had the gun at different times throughout the night. And as soon as Johnson walked in, testimony established that it was defendant who pointed the gun at him, which shows that defendant had even more "use" of the gun than the defendant in *Bulls*. Although many of the witnesses' testimonies were contradictory on some points, Cheney's, McNeil's, and King's testimonies all indicate that defendant was in charge. Further, there is ample evidence that defendant ran from the scene. See *id.* Not only did defendant run to the vehicle and speed away, but there is testimony that when Little asked where her boyfriend was, defendant told her that "you better go [get] him, he's over there dying bitch." This shows a total disregard for human life. Defendant did not stop or attempt to help Johnson. After the shooting, defendant proceeded to try and hide the evidence by telling McNeil to throw the shotgun in the woods and burning McNeil's clothes. Defendant also sexually assaulted King by "pinching" her vagina while she was taped up. Defendant also made threatening sexual remarks to King, suggesting that he and McNeil sexually assault her. The sexual assault and threats also show a willful disregard for human life. When the evidence is viewed in a light most favorable to the prosecution, a reasonable jury could find that malice was proven beyond a reasonable doubt. See *Meissner*, 294 Mich App at 452.

***6** Defendant claims there was no evidence to support a finding beyond a reasonable doubt that defendant intended to aid Cheney in shooting Johnson, or that he knew Cheney intended to shoot him. He points to the fact that he was out of the house at the time Cheney reflexively pulled the trigger after Johnson lunged at her, thus failing to establish that defendant had the requisite malice. But defendant pointed the shotgun at Johnson before asking Johnson where the money was located. When Johnson told defendant that the money was in the truck, he simply handed the gun to Cheney, who testified that she had virtually no experience with weapons and that she had used methamphetamine. Therefore, a reasonable jury could conclude that defendant knowingly created a very high risk of death or great bodily harm, and that shooting Johnson was a "natural and probable consequence" of the armed robbery. See *Robinson*, 475 Mich at 15.

C. MISTRIAL

Next, defendant contends that the trial court abused its discretion by denying defendant's motion for a mistrial. We disagree.

"We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial. This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

At trial, defendant moved for a mistrial on the ground that McNeil's testimony revealed that defendant was incarcerated. Generally, "[r]eferences to a defendant's prior incarceration are, unless specifically ruled otherwise, generally inadmissible." *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). But "not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *People v Griffin,* 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). And "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Schaw*, 288 Mich App at 236 (quotation marks and citation omitted).

Defendant objects to the following testimony:

> [*Prosecutor*]: Have you been threatened by [defendant] since this happened?

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> [*McNeil*]: I have.
>
> [*Prosecutor*]: What—describe that.
>
> [*McNeil*]: On a day to day basis he calls me a rat, he—
>
> [*Defense Counsel*]: Objection
>
> [*McNeil*]: —tries popping the doors.
>
> [*Defense Counsel*]: Objection. May we approach?
>
> [*McNeil*]: Walking the hall.

After a bench conference, the prosecutor asked McNeil whether he was afraid of repercussions from testifying against defendant. McNeil answered that he was.

On appeal, defendant pivots his argument from the implication that he was incarcerated to the content of McNeil's answers, asserting that McNeil's testimony amounted to impermissible character evidence under MRE 404(b), which unfairly presented him as violent or threatening. [4] But the prosecutor did not elicit this testimony for the purpose of showing that defendant had a reputation for being violent. Rather, the prosecutor was trying to illustrate that while McNeil received a plea deal in exchange for his testimony, he was also afraid to testify against defendant, which was relevant to his incentives and disincentives when testifying, and which were important to the jury's assessment of his credibility. The testimony was not unduly prejudicial to defendant, nor did it impair his ability to receive a fair trial. See *Schaw*, 288 Mich App at 236. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

D. PROSECUTORIAL MISCONDUCT

***7** Further, defendant maintains that, during closing arguments, the prosecutor made a misstatement of law and invited the jury to convict defendant of felony murder based solely on the premise that because he played such a large role in the robbery, he was guilty just as if he pulled the trigger. We disagree.

Because defendant did not object to the prosecutor's statement or request a curative instruction, this issue is unpreserved. See *Bennett*, 290 Mich App at 475. For unpreserved claims of prosecutorial misconduct, this Court examines whether the claimed error amounted to plain error that affected the defendant's substantial rights. See *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

"A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id.*

"The purpose of closing argument is to allow attorneys to comment on the evidence and to argue their theories of the law to the jury." *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), aff'd 431 Mich 506 (1988). "[A] prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case." *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). "A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Defendant's argument relates to the following:

> Second, that the defendant had one of these states of mind: He intended to kill, he intended to do great bodily harm, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions. Remember, we know, and that could have said her actions, because there's 3 people involved. We know Kayla is the one that fired the gun. She's the one that pulled the trigger, she's the one that ultimately caused the death. But you have to remember if Mr. Hunt—if you believe he played a role, which I believe the evidence has shown that he played a large role in all of this, then he is guilty just as if he pulled the trigger.

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> I think the third portion of that, where knowingly created a high risk of something happening, bringing a loaded sawed off shotgun into a situation where everyone had been using methamphetamine and the robbery was going to occur I think is creating that situation exactly.

When viewed in context, the prosecutor's argument was appropriate. Defendant argues that this statement allows the jury to simply infer malice from the underlying felony. However, the prosecutor correctly observed the malice requirement before and after he made the allegedly improper statement. See *Riley*, 468 Mich at 140. Therefore, the prosecutor did not misstate the law, and defendant's argument must fail.

***8** Even if there was error, the trial court issued an instruction informing the jury that the lawyers' arguments were not evidence and should not be considered as such. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009) (quotation marks and citation omitted). As a result, any minimal misstatement of law was cured. See *Grayer*, 252 Mich App at 357.

Defendant concurrently asserts that defense counsel was ineffective for failing to object to the prosecutor's closing arguments. However, defense counsel was not required to make a meritless objection to the prosecutor's closing arguments. See *Ericksen*, 288 Mich App at 201. Also, because defendant has failed to establish any prejudice from the failure to object, defendant's claim of ineffective assistance must fail. See *Carbin*, 463 Mich at 599-600.

E. BINDOVER

In defendant's Standard 4 brief, he contends that the district court abused its discretion when it bound him over on Count 2, the armed robbery of Johnson, and that testimony provided at the preliminary examination failed to fulfil the *corpus delicti* requirement for that charge. We disagree.

"Absent an abuse of discretion, reviewing courts should not disturb a [district court's] decision to bind over a criminal defendant for trial." *People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010).

"The purpose of the preliminary examination is to determine whether a felony has been committed and whether there is probable cause for charging the defendant therewith." *Id.* (quotation marks, citation, and alterations omitted). "If there is probable cause, the [district court] must bind over the defendant to appear before the circuit court, or other court having jurisdiction of the cause, for trial." *Id.* (quotation marks, citation, and alteration omitted). Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. *Id.* "This standard is less rigorous than the requirement to find guilt beyond a reasonable doubt to convict a criminal defendant, and the gap between probable cause and guilt beyond a reasonable doubt is broad." *Id.* (quotation marks and citation omitted). "To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). "If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial, where the questions can be resolved by the trier of fact." *Id.*

The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon. *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007).

In this case, there was sufficient probable cause to bind over defendant for the armed robbery of Johnson. King testified that she heard defendant demand money from Johnson. After Johnson replied that he did not have the money, Cheney hit King in the head with the gun. The next thing King remembered was hearing a "boom" and smelling "smoke." Eventually, she pulled the duct tape off and began giving Johnson CPR. St. Joseph County Sheriff's Deputy Kevin Brooks also testified that two women led him to Johnson, who was laying bloody, on his back, just outside of the residence. Additionally, defendant admitted to going to Johnson's truck and taking money and a cell phone that was later identified as belonging to Johnson. Defendant argues that any items of Johnson's were taken after defendant had already left the residence without the gun. But defendant threatened Johnson at gunpoint while in the residence, and he handed the gun to a cohort to restrain Johnson while defendant went to procure Johnson's property from the truck. Regardless whether defendant was the one who actually wielded the

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gun, it was used in concert with defendant's taking Johnson's property. Therefore, there was probable cause to bind over defendant on the armed robbery of Johnson, and the district court did not abuse its discretion. See *Plunkett*, 485 Mich at 57.[5]

***9** With regard to his *corpus delicti* argument, defendant contends that he was bound over on the armed robbery of Johnson based solely on his statement to law enforcement. We disagree.

"This Court reviews a lower court's decision regarding the *corpus delicti* requirement for an abuse of discretion." *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). "The *corpus delicti* rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence." *Id.*

The *corpus delicti* rule's purpose "is to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). "[I]t is not necessary that the prosecution present independent evidence of every element of the offense before a defendant's confession may be admitted." *Id.* at 117. Such a requirement "loses sight of the purpose of the rule and would require that the entire crime be proved before a confession could ever be admitted." *Id.* (quotation marks and citation omitted).

In this case, the testimony from King, Deputy Brooks, Sergeant Dahl, and Detective Spence was sufficient to establish that an injury occurred and some criminal element was involved. King testified that she was robbed at gunpoint by defendant and his group, and that it was clear that defendant was the one "calling the shots." King also testified that defendant and his group laid in wait for Johnson by being quiet and dimming the lights. King heard defendant telling Johnson to give him the money and asked Johnson where the money was. Both King and Deputy Brooks testified that they gave CPR to Johnson and that Johnson was shot. The medical examiner's report stated that King's death was caused by a gunshot wound. Deputy Brooks searched King's residence, which was "ransacked" and in "shambles." There were also blood tracks inside the house and entrance area. When Sergeant Dahl processed defendant's vehicle, he found several of the items that were stolen during the robbery in the vehicle. Detective Spence was able to identify the cell phone that defendant took as Johnson's cell phone. Once this evidence was presented, defendant's statement was properly admitted to establish that he took the money and phone from Johnson's truck. Therefore, no error occurred in the admission of defendant's statement as proof of armed robbery. See *id.*

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2021 WL 3700351

Footnotes

1 Defendant's Standard 4 Brief was filed pursuant to Supreme Court Administrative Order No. 2004-6.

2 Cheney and McNeil testified against defendant at trial. The prosecution offered them plea deals in exchange for their testimony.

3 Cheney pleaded guilty to second-degree murder, and she was later sentenced to 25 to 75 years' imprisonment. McNeil entered a plea to one count of armed robbery, and he was sentenced to 12 to 60 years' imprisonment.

4 With respect to defendant's objection at trial concerning any reference to defendant being in jail, McNeil's answer was shut down right away. Defense counsel objected before McNeil could finish his sentence. Additionally, McNeil's testimony does not outright state that defendant was in jail. Defendant argued in the

trial court that the jury picked up on the reference because the jury submitted a question to the trial court asking how defendant could contact McNeil every day. But the trial court did not believe the jury picked up on these references, and even if the jury did, the trial court did not allow the questioning to go any further. Further, the prosecution did not specifically solicit this testimony from McNeil. McNeil answered the question, and defense counsel properly objected before McNeil could finish. This is precisely the type of unresponsive, volunteered mention of incarceration that Michigan law makes clear does not entitle a defendant to a mistrial. See *Haywood*, 209 Mich App at 228.

5 Defendant also asserts that the trial court abused its discretion when it denied his motion to dismiss Count 2. Defendant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Regardless, because we have already concluded that there was probable cause to bind over defendant on Count 2, the trial court's denial of the motion was not an abuse of discretion.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Jeremia Scott JOHNSON, Defendant-Appellant.

No. 351606
|
September 2, 2021

Ionia Circuit Court, LC No. 2019-017719-FH

Before: Boonstra, P.J., and Cavanagh and Gadola, JJ.

Opinion

Per Curiam.

***1** Defendant appeals as of right his September 25, 2019 jury trial convictions for operating a vehicle while intoxicated (OWI), third offense, MCL 257.625(1); MCL 257.625(9)(c); operating a vehicle with a suspended license, second offense, MCL 257.904(1); MCL 257.904(3)(b); and operating a vehicle without security, MCL 500.3102. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 8 months to 15 years' imprisonment for operating while intoxicated, and to 15 days in jail for the two remaining offenses.

On appeal, defendant argues that (1) defense counsel was ineffective during the plea-bargaining process; (2) the trial court erred when it considered one of defendant's prior OWI charges because he was not represented by counsel for the prior charge, and he did not validly waive his right to counsel; (3) the prosecution committed misconduct when it argued facts not in evidence; (4) the prosecution committed misconduct by making false statements of law; and (5) defendant's conviction of driving without insurance was based solely on his statement to police and therefore did not comply with the *corpus delicti* rule. Finding no error warranting reversal, we affirm.

This case arises from defendant's third OWI conviction. Defendant was speeding past a Michigan State Trooper, and subsequently crashed his vehicle. Defendant did not provide insurance or a valid license to the Trooper upon request.

At trial, the prosecution called one witness: Michigan State Trooper Jennifer Alway. On January 1, 2019, Trooper Alway was patrolling M-66 in Berlin Township, Michigan, in Ionia County. As Trooper Alway was patrolling, her in-car radar showed that defendant was driving 68 miles per hour in a 55-mile-per-hour zone. Trooper Alway turned around to stop defendant's vehicle, and her radar then showed that defendant was traveling 90 miles per hour. As Trooper Alway was catching up to defendant's vehicle, she observed the vehicle go off the roadway to the right. Trooper Alway testified, "He went into the grass, up an embankment, went back over through the grass and went down the other side of the embankment and into the ditch and back on M-66."

Trooper Alway turned on her overhead lights and stopped defendant's vehicle. As Trooper Alway approached defendant's vehicle, she could smell a strong odor of marijuana. Defendant was revving his engine and sweating profusely as he spoke to Trooper Alway. Defendant admitted to smoking marijuana approximately 20 minutes before the traffic stop. When Trooper Alway asked for defendant's driver's license, defendant handed her a state identification and said that his license was not valid. The prosecution admitted a letter from the Michigan Secretary of State indicating that defendant's license was revoked at that time. Trooper Alway asked defendant for his proof of insurance, and defendant replied that he "didn't think there was any on it." Defendant told Trooper Alway that he stopped making his insurance payments "because he couldn't afford it." Trooper Alway noticed that defendant had run over a fencepost when he left the roadway, and defendant did not realize that he had hit it.

***2** Trooper Alway ran a series of sobriety tests on defendant, and concluded that on each test defendant gave some indicators that he was intoxicated. Defendant also had a green container in his vehicle, which contained marijuana wax. Trooper Alway placed defendant under arrest and took him to the Ionia Hospital for a blood draw. Defendant's lab reports showed that defendant's blood contained THC [tetrahydrocannabinol] which is found in marijuana, and Buprenorphine, also known as Suboxone, which is a schedule three controlled substance and is a narcotic. Defendant had

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a prescription for Suboxone and took it under medical supervision.

The trial court denied defendant's motion to dismiss the charges at the outset of trial and for a directed verdict following presentation of the prosecution's proofs. Defendant was convicted as charged and now brings this appeal.

Defendant first argues that defense counsel was ineffective during the plea-bargaining process. Generally, whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. See *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). This Court reviews constitutional questions de novo and a trial court's factual determinations for clear error. *Id.* A factual finding is clearly erroneous if we are "left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Although defendant has preserved the issue by filing a motion for remand in this Court, because we denied the motion and no evidentiary hearing has been held, review is limited to errors apparent in the lower court record. See *People v Abcumby-Blair*, —— Mich App ——, ——*People v Abcumby-Blair*, —— Mich App ——, ——; —— NW2d —— (2020)—— NW2d —— (2020) (Docket No. 347369); slip op. p. 8.

"As at trial, a defendant is entitled to the effective assistance of counsel in the plea-bargaining process." *People v Douglas*, 496 Mich 557, 591-592; 852 NW2d 587 (2014). To be entitled to relief for ineffective assistance, a defendant must meet *Strickland*'s[1] two-pronged test. *Id.* at 592. First, a defendant must establish deficient performance, which is that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* This is a heavy burden because defense counsel's performance is generally presumed to be effective and sound trial strategy. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008).

Second, a defendant must establish prejudice, which is that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In the context of pleas, a defendant must specifically show that the outcome of the plea process would have been different with competent advice. *Douglas*, 496 Mich at 592. Our Supreme Court has applied the following three-part test when a defendant claims ineffective assistance for rejecting a plea offer and standing trial: the defendant must show that, but for the ineffective advice of counsel, (1) there is a reasonable probability that the plea offer would have been presented to the trial court (i.e., that the defendant would have accepted the plea), (2) that the trial court would have accepted the terms of the offer, and (3) that under the plea offer's terms, the conviction or sentence would have been less severe than under the judgment and sentence that in fact were imposed. *Id.*

***3** "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v Frye*, 566 US 134, 145; 132 S Ct 1399; 182 L Ed 2d 379 (2012). "The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Accordingly, this Court has stated:

> Guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where defense counsel failed to explain adequately the nature of the charges or the consequences of the guilty plea. Guilty pleas have also been found to be involuntary or unknowing where counsel has failed to discuss possible defenses to the charges to which the defendant is pleading guilty. In these situations, counsel's deficient representation effectively renders the defendant's guilty plea involuntary because it deprives the defendant of the ability to make an intelligent and informed choice from among his alternative courses of action. [*Id.* at 445 (citation omitted).]

Because it is a defendant's burden to prove both deficient performance and prejudice, it is also the defendant's burden to establish the factual predicate for the claim. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999).

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In this case, defendant was offered a plea at the outset of the preliminary examination. The following is the dialogue concerning the plea offer:

> [*The Prosecutor*]: Yeah, I'd like to put the offer on the record, unless defense counsel wants to do it—
>
> *The Court*: You may.
>
> [*The Prosecutor*]: —put the offer on the record? Did you want to put the offer on the record?
>
> [*Defense Counsel*]: The off—the offer in this case was plead—plead as charged. I am—Your Honor, it's my understanding was just the offer on the record was plead as charged.
>
> [*The Prosecutor*]: Well what I'm—I see numerous offers in this case. It looks like the last one would be plead guilty to count one OWI third, dismiss count two and count three and the habitual fourth, Killebrew nine months confinement, fines, costs, restitution, PSI, probation. So the defendant's choosing to exercise his right to run the preliminary examination. With that, the People may-made this offer—will expire and it may not be offered again.
>
> *The Court*: Anything else to place on the record?
>
> [*Defense Counsel*]: May I inquire of my client, Your Honor?
>
> *The Court*: Sure.
>
> [*Defense Counsel*]: Jeremia, you heard the offer that the Prosecutor placed on the record?
>
> *Defendant*: Yes.
>
> [*Defense Counsel*]: And—and are you accepting that offer?
>
> *Defendant*: No.
>
> [*Defense Counsel*]: Thank you, Your Honor. Nothing further.

Defendant argues that he lacked sufficient information to make an informed decision. We agree. In fact, it appears that there was no information or counsel given to defendant. Defense counsel did not go off the record to explain the plea to defendant or even try to explain the plea to defendant on the record. Defense counsel simply asked if defendant heard the offer and whether he would be accepting it. "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v Cooper*, 566 US 156, 168; 132 S Ct 1376; 182 L Ed 2d 398 (2012). However, in this case, defendant received no advice of counsel concerning the plea offer.

***4** Defense counsel was required to tell defendant the direct consequences of the plea, see *People v Fonville*, 291 Mich App 363, 385; 804 NW2d 878 (2011), and was required to convey any favorable terms of the plea to defendant. See *Frye*, 566 US at 145. But defense counsel failed to explain any positive or negative consequences of the plea—the record is simply bare. It is apparent from the record that defense counsel himself was unaware of the plea offer because he thought that the only offer was "plead as charged." At sentencing, defense counsel continued to state that that "[t]here was no plea agreements in this case," even though a plea was clearly stated before the preliminary exam. Trial counsel could not have properly advised defendant of the plea deal when he did not know that there was a plea offer, let alone properly advise defendant of the benefits of the plea offer. Therefore, defense counsel was objectively ineffective for failing to explain the plea offer to defendant.

Defendant concurrently argues that defense counsel was ineffective because defense counsel reassured defendant that the charges would be dismissed at trial and that the prosecution had a weak case. But this argument fails because defendant continued to maintain his innocence, and defense counsel cannot be faulted for relying on defendant's assertions of innocence. See *People v Frazier*, 478 Mich 231, 244; 733 NW2d 713 (2007).

Relatedly, defendant briefly argues that he was prejudiced because he would have pleaded guilty if counsel was effective. However, defendant has failed to show that, but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the trial court (i.e., that the defendant would have accepted the plea). See *Douglas*, 496 Mich at 592. Defendant maintained his innocence from beginning to end, and he presented a strong defense at trial. Defendant planned to fight the case from the outset. Defense counsel noted that defendant wanted a preliminary exam and a trial. In defendant's affidavit, he still did not state that he would have accepted the plea; rather he suggested that he should have had proper time to consider the offer and to work toward a new plea offer.

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Furthermore, defendant has failed to establish that if the plea agreement had been presented to the court, the court would have accepted it. At both sentencing hearings, the trial judge expressed serious concerns about defendant's criminal history and the court's obligation to protect the public. At the first sentencing hearing, the trial judge indicated that if defendant was not eligible for sobriety court, the sentence would involve a prison term. Therefore, defendant has failed to establish the factual predicate of his claim, see *Hoag*, 460 Mich at 6. See *Douglas*, 496 Mich at 598. Consequently, defendant has failed to show that he was prejudiced. See *id.*

Next, defendant argues that the trial court erred when it considered one of defendant's prior OWI charges for enhancement purposes because he was not represented by counsel. We disagree. We review for clear error the trial court's factual findings underlying a waiver of counsel. See *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). We review de novo, as a question of law, the issue whether defendant's waiver of counsel was knowing, intelligent, and voluntary. See *id.*

The "failure of a plea-taking court to adhere to applicable plea-taking requirements during the plea proceeding does not provide a defendant the opportunity to challenge by collateral attack." *People v Ingram*, 439 Mich 288, 294-295; 484 NW2d 241 (1992). "The validity of such a plea, where the defendant was represented by an attorney when entering the plea or when the defendant intelligently waived the right to counsel, including the right to court-appointed counsel if indigent, is unassailable." *Id.* at 295. Therefore, we must determine whether defendant's waiver of counsel was proper. See *id.*

***5** The Sixth Amendment right to counsel applies to the plea-bargaining process. *Cooper*, 566 US at 162-163. However, under the United States and Michigan Constitutions a criminal defendant is entitled to self-representation, see Const. 1983, art. 1, § 13; MCL 763.1; *Faretta v California*, 422 US 806, 812, 95 S Ct 2525, 45 LEd2d 562 (1975), and a defendant can waive his or her right to counsel, *Montejo v Louisiana*, 556 US 778, 786; 129 S Ct 2079; 173 L Ed 2d 955 (2009). Valid waiver of the right to counsel requires that a trial court make three findings. See *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Our Supreme Court has stated,

> First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Williams*, 470 Mich at 642.]

Analogously, MCR 6.005(D) and (E), and MCR 6.610(D) list similar requirements. These requirements do not need to be read as a "litany" because "substantial compliance" is adequate to protect a defendant's rights. *People v Russell*, 471 Mich 182, 191; 684 NW2d 745 (2004). "[W]hether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 201.

Before defendant pleaded guilty to his second OWI, he signed a SCAO-approved advice-of-rights form. Additionally, the trial court found that defendant was orally informed of his right to counsel. The trial court held that the combination of the advice-of-rights form and the questions and answers from the district court met the requirements for a valid waiver of counsel. Defendant also was experienced with the criminal justice system, as that was his second OWI and he is currently a fourth-offense habitual offender. Therefore, when looking at the totality of the circumstances, the district court *substantially* complied with the waiver requirements, and defendant's waiver of counsel was knowingly, intelligently, and voluntarily made. See *Williams*, 470 Mich at 642; see also *Russell*, 471 Mich at 191.

Defendant further argues that the prosecutor committed misconduct during opening statements and closing arguments, and that defense counsel was ineffective for failing to object. We disagree. Because defendant failed to object to the prosecutor's statements, this issue is unpreserved.

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People v Bennett, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review a claim of prosecutorial misconduct de novo to determine whether the misconduct deprived the defendant of a fair trial. See *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). For unpreserved claims of prosecutorial misconduct, we examine whether the claimed error amounted to plain error that affected the defendant's substantial rights. See *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). An unpreserved claim of prosecutorial misconduct will not warrant relief unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

***6** "The purpose of closing argument is to allow attorneys to comment on the evidence and to argue their theories of the law to the jury." *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), aff'd 431 Mich 506 (1988). "[A] prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case." *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). But a prosecutor may not argue facts that were unsupported by the evidence. See *Unger*, 278 Mich App at 241. "A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005),

In this case, defendant argues that the prosecutor engaged in misconduct when the prosecutor argued facts not in evidence. Defendant argues that the first instance of misconduct was when the prosecutor told the jury twice that defendant smoked "a bowl of marijuana," although defendant's testimony was that he only took "one hit" of the bowl of marijuana. Defendant argues that the second instance of misconduct was when the prosecutor told the jury that defendant admitted that he was too impaired to drive, although defendant actually said that he was nervous because he was driving without a license.

The prosecutor concedes that defendant testified that he only took one hit. But the prosecution argues that defendant's blood contained 14 nanograms of THC. Defendant also exhibited poor driving, had minor deficiencies in his sobriety-test performance, and his vehicle smelled of marijuana. The prosecutor argues that reasonable inferences could be drawn from the evidence that defendant actually smoked the entire bowl of marijuana.

The relevant dialogue from the prosecutor's closing argument and rebuttal are as follows:

> [*The Prosecutor's Closing Argument*]: Defendant's manner of driving was not normal. Was his judgment normal? *He testified that he smoked a bowl of marijuana and he smokes marijuana to sleep.* Then, he wants to go into work to make money, *so he says I went against my better judgment. I knew I was not supposed to be driving. He's telling you that his judgment was not normal that night.* What was the result of him being under the influence when driving? He also did not exhibit normal driving behavior. How normal is it to—well, he said he was able to see where he was going. He said he was distracted. And the turn that he takes every time when he's going to work he was unable to execute it, and then he drove off the roadway. He made a decision and a choice to drive after smoking marijuana. He says he smokes marijuana to sleep. So his way of driving is a key factor that you need to consider, but you can also consider the evidence that Trooper Alway testified to. The smell of marijuana, which immediately she started to think well, I'm investigating marijuana in this case but I'm also gonna (sic) have the defendant do some standardized field sobriety tests.
>
> * * *
>
> [*The Prosecutor's Rebuttal*]: He's right that he wasn't charged with use of a controlled substance. He wasn't charged with using marijuana. He wasn't charged with using Suboxone. He was charged with the crimes that he committed on that day, that night, January 1st, 2019, because he was committing a crime. When *after smoking a bowl of marijuana* that he uses to sleep and also while having Suboxone, which is a narcotic, in his blood he decides so he can make a little bit more money, that he is going to drive to work.

***7** Defendant's relevant testimony was as follows:

> [*Defendant*]: At that point, I had planned to just stay home. I use marijuana to sleep and that's what I had planned to do. *I had packed a bowl and I had taken one hit.* And in that process I thought about the money I would have lost by not going to work. Like I said, on a normal day I never even would have even risked it. It was New Year's Day and I stood to lose, not only double time, but double time and

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> a half, which would have been time and a half for working the holiday and then holiday pay. And against my better judgment, my worst judgment, I decided to drive. *But like I said, I packed a bowl, I took one hit and in that time is when I decided to drive.*
>
> * * *
>
> [*Defense Counsel*]: Okay. And the reason that you had gone off the road slightly and hit that post and the wire, is that because you were driving too fast or because you had taken a couple hits on marijuana?
>
> [*Defendant*]: It was because I was going too fast just to make sure of being nervous as soon as I passed the cop. I mean my heart started pounding. I knew I wasn't supposed to be driving. I knew I was probably going to jail. And just between that being nervous and then distracted, watching her in my rear view, it all kind of led to—
>
> * * *
>
> [*Defendant*]: Just that, like I said earlier, I had taken *a hit of marijuana.* You couldn't really hear it. She went onto say do you always smoke a joint before driving, which I don't even smoke joints. And I—that wasn't what I had said.

In this case, there was no prosecutorial misconduct. Defendant testified that he took one hit of marijuana. However, defendant did not explain the size of his "bowl" or "hit" of marijuana. Defendant did not argue at trial or in his brief that one "hit" of marijuana could not have been the size of his "bowl" of marijuana. And this Court cannot assume these facts without a record. Further, the prosecutor never specifically stated that defendant smoked the *entire* "bowl" of marijuana, but instead vaguely stated that defendant smoked "a bowl" of marijuana.

Additionally, the prosecutor could have drawn reasonable inferences from the evidence that defendant did smoke the entire "bowl" of marijuana. Defendant was driving extremely erratically and crashed his vehicle; defendant ran over a post and did not realize it; his vehicle smelled of marijuana; he was sweating and appeared nervous; he was revving his engine while stopped; his blood contained THC; and he did fail some portions of his field sobriety tests. Further, defense counsel implied that defendant took more than one hit of marijuana when he asked, "[I]s that because you were driving too fast or because you had taken *a couple hits* of marijuana?" Defendant did not correct defense counsel or deny taking a "couple hits" of marijuana. Therefore, we conclude that the prosecutor argued reasonable inferences from the evidence. See *Unger*, 278 Mich App at 236.

There is also no merit to defendant's claim that the prosecutor misinterpreted defendant's statements of driving against his judgment. Defendant clearly stated, "And against my better judgment, my worst judgment, I decided to drive." The prosecutor was right to infer that defendant was going against his better judgment when he drove after smoking marijuana. Nowhere in the preceding or subsequent sentences was defendant referring specifically to his license being suspended, as defendant argues in his brief. In fact, the next sentence from defendant was, "But like I said, I packed a bowl, I took one hit and in that time is when I decided to drive." Therefore, there was no prosecutorial misconduct during closing arguments.

***8** Additionally, the trial court issued a curative instruction when it stated,

> The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

Because "[j]urors are presumed to follow their instructions, and it is presumed that instructions cure most errors," *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011), defendant has not established that he was prejudiced by the prosecutor's alleged misstatements. Therefore, defendant has failed to establish a claim of prosecutorial misconduct.

Defendant also argues that the prosecutor committed misconduct when he misstated the law during opening statements. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." See *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id.*

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In this case, defendant argues that the prosecutor misstated the law when he said the following during opening statements:

> What's that evidence gonna (sic) be? That evidence is gonna (sic) include sworn testimony from Trooper Jennifer Alway and Trooper Megan Moryc. You'll also hear sworn testimony from Milica Bowman, who works at Sparrow Ionia Hospital who drew Mr. Johnson's blood. You'll also hear sworn testimony from Samantha Kellogg, who tested Mr. Johnson's blood at a lab in Lansing, and you'll also hear from Mr. Logan Albertson, who also tested Mr. Johnson's blood at a lab in Lansing. Sworn testimony is evidence. Things that witnesses say on the witness stand is evidence.

Specifically, defendant argues that the prosecutor committed misconduct because when he said the troopers' testimony would be "sworn testimony," he was implying that the jury had to believe the troopers' testimony. We disagree.

It is a common-sense notion that testimony is evidence, and "testimony alone can provide sufficient evidence to support a conviction." *People v DeLeon*, 317 Mich App 714, 719; 895 NW2d 577 (2016). It is also a common-sense notion that testimony is sworn by an "oath or affirmation." MRE 603. Therefore, all testimony is indeed sworn testimony.

In this case the prosecutor did not misstate the law. In fact, he correctly stated that the troopers' testimony would be "sworn testimony." The trial court echoed this during jury instructions by stating:

> When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the *sworn testimony* of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence.

The prosecutor said exactly what the jury instructions conveyed to the jury. Therefore, the prosecutor made a correct statement of law, and there was no prosecutorial misconduct. As shown, the trial court did issue curative instructions regarding any sworn testimony. Therefore, even if there was prosecutorial misconduct, it was not prejudicial. See *Mahone*, 294 Mich App at 213.

***9** Defendant additionally argues that defense counsel was ineffective for failing to object to the prosecutor's statements during closing arguments. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In this case, defense counsel was not required to make a meritless objection to the prosecutor's closing argument and opening statement. See *id.* Also, because defendant has failed to establish any prejudice from the failure to object, defendant's claim of ineffective assistance must fail. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (stating that a defendant must establish that defense counsel's performance prejudiced the defendant to succeed on a claim of ineffective assistance of counsel).

Defendant finally argues that the *corpus delicti* rule was not satisfied because the prosecution failed to show any proof that defendant did not have insurance other than defendant's statements to Trooper Alway. We disagree. We review a lower court's decision regarding the *corpus delicti* requirement for an abuse of discretion. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). "However, whether a rule or statute precludes admission of evidence is a matter of law and is reviewed de novo." *Id.* A "challenge to the admission of a defendant's statement under the *corpus delicti* rule constitutes a challenge to the admission of evidence, not to the sufficiency of evidence." *People v Harden*, 474 Mich 862 (2005).

The *corpus delicti* rule's purpose "is to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). "The rule bars the prosecution from using a defendant's confession in any criminal case unless it also

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presents direct or circumstantial evidence independent of the defendant's confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury." *Id.* Traditionally, the *corpus delicti* rule only applied to homicide cases, but it now applies to more crimes. *People v Cotton*, 191 Mich App 377, 385; 478 NW2d 681 (1991).

Corpus delicti may be established by direct evidence, circumstantial evidence, and reasonable inferences drawn from such evidence. See *People v Modelski*, 164 Mich App 337, 341-342; 416 NW2d 708 (1987). Further, the *corpus delicti* need only be proved by a preponderance of the evidence. *Id.* at 342.

To convict defendant of operating a vehicle without security, the prosecution needed to prove that (1) defendant was the owner or a motor vehicle; (2) in order to operate the motor vehicle, the motor vehicle was required to have security (insurance); (3) defendant operated the vehicle on a public highway in the State of Michigan; and (4) defendant did not have security on the vehicle. See MCL 500.3102. Further, if a defendant did not produce evidence that the vehicle had sufficient security, there is a rebuttable presumption that the motor vehicle did not have sufficient security. See MCL 500.3102(3).

***10** In this case, defendant only challenges element (4), which is that his vehicle did not have sufficient security. The trial court found that there was circumstantial evidence relating to elements (1) through (3), and that the prosecution did not need to produce independent evidence on every element. Indeed, "it is not necessary that the prosecution present independent evidence of every element of the offense." *Ish*, 252 Mich App at 117. *Corpus delicti* "is satisfied and a defendant's confession may be admitted into evidence when the prosecutor presents direct or circumstantial evidence, independent of the confession, establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury." *Cotton*, 191 Mich App at 385. The criminal agency in most *corpus delicti* cases is evidence that a homicide was committed, see *People v McMahan*, 451 Mich 543, 550; 548 NW2d 199 (1996). In this case, the *corpus delicti* would be that defendant did not actually have security on his vehicle.

The statute is clear that if a defendant does not produce proof of security, there is a rebuttable presumption that the vehicle did not have sufficient security. See MCL 500.3102(3). In this case, defendant did not produce his insurance. Trooper Alway asked defendant for his proof of insurance, to which defendant replied that he "didn't think there was any on it." Defendant told Trooper Alway that he stopped making his insurance payments "because he couldn't afford it." Because of defendant's failure to produce proof of insurance upon Trooper Alway's request, a rebuttable presumption arose that defendant did not have insurance on the vehicle, independent of his statements to Trooper Alway confirming the lack of insurance. See MCL 500.3102(3). Further, defendant testified at trial, and he did not offer testimony rebutting the presumption. When defendant failed to produce proof of insurance, reasonable inferences could be drawn that defendant did not have insurance to satisfy the requirement, which would satisfy the *corpus delicti* rule by a preponderance of the evidence. See *Modelski*, 164 Mich App at 341-342. Because there was a rebuttable presumption that defendant did not have insurance, and defendant did not do anything to rebut that presumption, defendant's argument fails.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2021 WL 4000365

Footnotes

1 *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Sean Michael PHILLIPS, Defendant–Appellant.

Docket No. 326005.
|
Oct. 22, 2015.

Mason Circuit Court; LC No. 14–000318–AR.

Before: M.J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

Opinion

PER CURIAM.

***1** In June of 2011, four-month-old Katherine "Kate" Phillips disappeared in Ludington, Michigan, after she was last seen with defendant in his vehicle. Kate's body was never found. Defendant was charged and convicted of unlawful imprisonment, MCL 750.349b, in connection with her disappearance. We affirmed that conviction in *People v. Phillips,* unpublished opinion per curiam of the Court of Appeals, issued December 17, 2013 (Docket No. 311110), and our Supreme Court denied defendant's application for leave to appeal. *People v. Phillips,* 496 Mich. 859; 847 NW2d 624 (2014). Defendant began corresponding with Kate's mother, Ariel Courtland, while he was incarcerated. Courtland wrote defendant a letter asking questions about the circumstances surrounding Kate's death. Defendant responded with a five-page letter that indicated Kate had died when he ripped her car seat from his vehicle, and she was "thrown from it." He indicated in the letter that at the time he ripped the car seat from the vehicle, he thought that Courtland had Kate and that he did not know she had been in the car seat. He also stated in the letter that after it was "too late" to help Kate, he drove to an unknown location, exited his vehicle, walked for some distance, and set Kate in a "peaceful place" before returning home. After the letter was intercepted by law enforcement, the prosecution charged defendant with open murder, MCL 750.318. The district court, however, refused to bind defendant over on the charge of open murder because, in its view, the prosecution had failed to establish the *corpus delicti* for murder. The prosecution appealed to the circuit court, which reversed the district court's order, concluding that, based on the controlling law, the prosecution was entitled to pursue the open murder charge. Defendant appeals that decision by leave granted. [1] For the reasons set forth in this opinion, we affirm.

I. FACTS

Defendant and Courtland began a romantic relationship in high school, when Courtland was just 14 years old and defendant was 16 years old. Courtland gave birth to the couple's first child, HP, when she was 15 years old. Defendant was present for HP's birth and accepted paternity. From that point until June 2011, the couple had an "on and off again" relationship. In May 2010, Courtland discovered that she was pregnant with Kate. Courtland testified that defendant wanted her to get an abortion because he did not think they could afford two children, he was going to be deploying with his National Guard unit, and his parents, who disapproved of the couple's relationship, would kick him out of their house and "disown him" if they found out Kate was his. Courtland testified that she initially told defendant she did not believe in abortion and that they argued about it weekly. At one point, defendant told Courtland that she was trying to ruin his life. Courtland eventually allowed defendant to believe she would consider an abortion and she accepted money from him to help pay for the procedure. She then used the money to purchase items for the expected child.

***2** After defendant discovered that Courtland did not get an abortion, the couple started discussing adoption. Courtland testified that although she considered it at one point, she decided she did not want to proceed with an adoption.

Kate was born on February 12, 2011. At that point, defendant and Courtland were still trying to work things out. Although they had a custody arrangement for HP, there was no such arrangement for Kate; defendant simply saw her whenever he came over to visit. Outside of his parent's presence, defendant treated Kate the same as he did HP. However, he denied paternity for Kate and stole birth announcements that listed him as Kate's father. The arguments over whether Kate would be placed for adoption continued between Kate's birth and June of 2011, when she disappeared.

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At some point, the Department of Health and Human Services (DHHS) discovered that there was no father listed on Kate's birth certificate. DHHS forwarded that information to the Mason County Prosecutor's office to initiate paternity proceedings, which the prosecutor's office did. On April 21, 2011, Courtland signed a complaint for paternity at the prosecutor's office, alleging that defendant was Kate's father. Those documents were then served upon defendant on May 22, 2011. When he was served, defendant "became upset" and "didn't want to pay" child support. On June 10, 2011, defendant moved the circuit court for a paternity test and on June 15, 2011, the circuit court issued an order for DNA testing. Defendant and Courtland were notified of their scheduled times for DNA testing: defendant was scheduled for June 29, 2011 at 12:00 p.m., while Courtland was scheduled for 1:00 p.m. that same day. It appears that Kate was scheduled to have a DNA test at 1:00 p.m. that day.

Defendant submitted to a DNA test at Memorial Medical Center in Ludington at 11:45 a.m. on June 29, 2011.[2] He left Memorial Medical Center at 12:04 p.m. and went to Courtland's apartment. When he arrived, he was wearing black "Seedless" shoes. According to Courtland, defendant was "fine" when he first arrived, but he became upset after learning that Courtland was still planning to take Kate for DNA testing. She stated that they argued before eventually leaving her apartment around 12:50 p.m. Courtland explained that defendant was driving and Kate was strapped in a car seat behind him. Although Courtland believed they were going to the hospital to conduct the DNA test, defendant drove to the DHHS office next to the hospital instead. When they arrived, Courtland refused to go inside and instead said she would walk to her appointment. She stated that she got out of defendant's vehicle, walked around to Kate's door, unbuckled her, and picked her up to take her out. Courtland testified that defendant then said "something" that prompted her to buckle Kate back in her car seat and get back into the car. She said that they then returned to her apartment, passing the hospital in the process.

***3** When they arrived back at the apartment, Courtland told defendant that they had to go back to the hospital because they were already late for the appointment. Again, Courtland got out of the vehicle, walked around to Kate's door, unbuckled her, and picked her up. She stated that she then placed Kate back down in her car seat, without buckling her, and asked defendant if he would watch her while she went to get a stroller. Courtland added that she was gone for about a minute and that when she returned with the stroller, defendant's vehicle was gone.

Courtland thought defendant may have gone to get food. Because her cell phone was in his vehicle, she called defendant from a friend's apartment. Defendant did not answer that call. Nor did he answer numerous additional phone calls Courtland made. When Courtland was unable to reach defendant, she called 911. After telling the police what happened and how they could reach defendant and defendant's parents, Courtland unsuccessfully tried to find defendant before eventually going to her mother's home to make additional phone calls regarding Kate and to wait for the police to contact her. In the meantime, the responding officer continued looking for defendant.

According to cellular telephone tower records, there was a two-hour gap from 1:17 p.m. until 3:18 p.m. on June 29, 2011, during which defendant's cellular telephone was apparently turned off and not transmitting. Defendant eventually returned home between 3:00 and 3:15 p.m. His mother met him outside. Kate was not with him. When his mother asked where she was, defendant told her that she was with Courtland. Around 3:35 p.m., defendant called the police department and spoke to the responding officer, who asked defendant if he had Kate. Defendant stated that Kate was with Courtland. When he was asked about his whereabouts during the day, defendant stated that he had gone to the hospital for a DNA test before picking up Courtland and Kate and driving to DHHS. Defendant indicated that he and Courtland argued on the way to the DHHS office about putting Kate up for adoption. He then indicated that he dropped Kate and Courtland off and went home. The officer told defendant to stay where he was and that an officer would be out to speak with him further.

Around 3:54 p.m., two officers arrived at defendant's house. Defendant was pacing back and forth in the driveway wearing tennis shoes. Upon later review of the video footage from the hospital from that day, investigators learned that the shoes defendant was wearing when they made contact with him were different than the ones he had been wearing at the hospital.

When they arrived, the officers did not see a car seat inside defendant's vehicle. They introduced themselves and told defendant that they were looking for Kate. Defendant told the officers that "it" was with Courtland. Defendant stated two more times that "it" was with Courtland, after which

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one officer told him he was lying. Defendant apparently then acknowledged that he was not telling "the whole truth."

***4** The officers decided to transport defendant to the police station for further questioning. Before transport, they conducted a pat-down search of defendant. Defendant had a noticeable bulge in the right cargo pocket of his shorts. When the officers asked defendant what was in his pocket, defendant responded "her clothes." A officer then reached in and pulled out an infant's outfit: a white tank top with flower print and a pair of pink bottoms. The clothing was "wadded up in a ball and turned inside out." Courtland identified the clothes as the same clothes Kate was wearing when she disappeared. The officers then thoroughly searched defendant's vehicle. They found an infant car seat and a diaper bag in the trunk. The officers then searched defendant's parents' house, but found no sign of Kate. Investigators subsequently conducted more thorough searches of defendant's parents' house and defendant's vehicle. In the house they located a pair of dark "Seedless" brand shoes consistent with the ones defendant had been wearing in the hospital surveillance footage. The shoes were wet, and there was dirt and plant material embedded into the suede and soles. In the vehicle under the front passenger seat, the officers discovered a soiled diaper, matching the ones found in the diaper bag. Courtland testified that she had not left any used diapers in the car.

Defendant was questioned at the Ludington Police Department. When asked what the nature of his relationship with Courtland was, defendant responded that they "dated briefly years ago." Defendant further indicated that they had a child in common and that Courtland "intentionally got pregnant" with another child, but that "it" was not his. As to Kate's disappearance, defendant indicated that after leaving Courtland's apartment that day, he went to Wendy's and then went home.

Defendant was initially charged with unlawful imprisonment in connection with Kate's disappearance. On July 11, 2011, while defendant was in the county jail awaiting trial for unlawful imprisonment, a corrections officer recovered a piece of paper in the shirt pocket of defendant's clothing. On that paper was a statement from defendant wherein he indicated that he gave Kate away for adoption and provided information for a website in which the adoptive family's information could be obtained. After reading the note, the corrections officer gave it to an investigator in the case. In response to the contents of the note, investigators searched defendant's and Courtland's computers. The searches revealed that defendant had gone toParentProfiles.com, a website for adoptions. Investigators contacted everyone whose profile on that website had been accessed by defendant. None of them had Kate. And none of them had any contact with defendant or Courtland. Investigators found no evidence that the child was ever adopted out or given to anyone.

While incarcerated, defendant and Courtland began writing letters to each other. Because the investigation of Kate's disappearance was still considered ongoing, defendant's mail was monitored by prison officials. Of particular note to investigators was a letter written to defendant by Courtland, in which Courtland asked defendant several questions about the circumstances surrounding Kate's disappearance.

***5** Sometime around August 7, 2012, defendant responded to the above letter with his own five-page, handwritten letter.[3] In the letter, defendant indicates that he ripped the car seat out of his car, without realizing Kate was in it, and that she was thrown some distance. He writes that he picked her up and held her, but without trying to help her, until it was "too late" to call 911. He then describes driving for an unknown period of time to an unknown place, where he placed Kate's body in a "peaceful place" before returning home.

At defendant's preliminary examination, the prosecution elicited testimony from Dan Ruba, who lived with Courtland's mother, regarding certain statements that defendant made to him. Specifically, Ruba recalled an occasion after Kate was born when defendant told him that he "really didn't think that Kate was his kid because ... he didn't love her." Ruba also recalled an occasion approximately two months before Kate disappeared when he was drinking beer with defendant and defendant said that he hated Courtland and "was willing to do anything to make her go away." Ruba testified that defendant also said that, because of his military training, he could kill someone and hide the body and no one would find it.

Finally, the prosecution elicited testimony from Rushaun Burton, who was housed in the Carson City Correctional Facility with defendant between March and October 2013. Burton testified that he first met defendant in the prison cafeteria and spent time with him in various places outside their cells. He recalled that in July of 2013, he was talking with defendant about Kobe Bryant, Tiger Woods, and women who divorce their husbands and get all of their money. He said that defendant stated that he had a "similar situation, the girl has a baby that's not his and she's not gonna get a dime from him." He said that defendant told him that he "picked

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the baby up and got rid of the baby." When Burton asked him what he meant, defendant "kind of got closed up from the conversation" and said "well I can't be charged because they won't find it—won't find the baby." Defendant did not say anything else during the conversation and he never mentioned the child to Burton again.

The district court ultimately refused to bind defendant over on the charge of open murder based upon its conclusion that the prosecution had failed to establish the *corpus delicti* of murder; specifically, that Kate's death was caused by some criminal agency. In so doing, the district court relied upon defendant's prison letter and concluded that the letter provided the "only facts" regarding Kate's death; i.e., that her death was accidental because defendant did not know that Kate was in car seat when he ripped it from the vehicle. On appeal, the circuit court reversed the district court's order, concluding that the totality of the circumstantial evidence, and not just defendant's letter, could be viewed in determining whether there was sufficient proof of criminal agency. The circuit court ultimately concluded that based on controlling law, the prosecution was entitled to pursue the open murder charge. This appeal follows.

II. *CORPUS DELICTI* RULE

***6** Defendant argues that the district court did not abuse its discretion when it refused to bind defendant over on the open murder charge. He asserts that, based on the evidence presented, the district court judge correctly concluded that there was no proof that Kate had died from a criminal agency, i.e., that there was insufficient proof to establish the *corpus delicti* of murder.[4] We disagree.

The *corpus delicti* of a crime must be established by evidence independent of a defendant's confession. *People v. McMahan,* 451 Mich. 543, 549; 548 NW2d 199 (1996). "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v. Konrad,* 449 Mich. 263, 269; 536 NW2d 517 (1995). The rule provides that a defendant's *confession* may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing the occurrence of the specific injury and some criminal agency as the source of the injury. *McMahan,* 451 Mich. at 549, citing *Konrad,* 449 Mich. at 269–270. The *corpus delicti* may be established by direct evidence, circumstantial evidence, and reasonable inferences from such evidence. *People v. Modelski,* 164 Mich.App 337, 341–342; 416 NW2d 708 (1987). Further, the *corpus delicti* need only be proved by a preponderance of the evidence. *Id.* at 342; *People v. Brasic,* 171 Mich.App 222, 227; 429 NW2d 860 (1988).

The *corpus delicti* of murder consists of two elements: "the death of the victim and some criminal agency as the cause." *People v. Williams,* 422 Mich. 381, 392; 373 NW2d 567 (1985). In cases where, as here, the victim is alleged to have been murdered, but the body is not found, the criminal-agency component of the *corpus delicti* is particularly important. "Absent some showing of criminal agency, there are any number of possible explanations for an individual's disappearance, including death by accidental means." *McMahan,* 451 Mich. at 550. See also *Modelski,* 164 Mich.App 337 (holding that the criminal-agency prong of the *corpus delicti* rule had been met by showing that the victim disappeared suddenly and was never heard from, the defendant had a motive to kill her in light of his deteriorating marriage and his allegation of infidelity against his wife, and the defendant's actions that suggested he had murdered the victim); but see *People v. Fisher,* 193 Mich.App 284; 483 NW2d 452 (1992) (holding that the *corpus delicti* of murder had not been shown, despite circumstantial evidence of motive and opportunity, where the victim's body was not found and where there was no direct admission, no physical evidence, and no witness to the killing).

Significantly, the *corpus delicti* rule applies only to confessions of guilt, not to exculpatory statements by the defendant, guilty conduct of the defendant, or admissions of fact that do not amount to a confession of guilt. In *People v. Porter,* 269 Mich. 284, 290; 257 NW 705 (1934), our Supreme Court took note of the distinction between confessions and admissions, citing the following from 2 Wharton's Criminal Evidence (10th ed), § 622b:

> ***7** A confession, although differently phrased by different courts, being an acknowledgment, in express terms, by a party in a criminal case, of the truth of the crime charged, by the very force of the definition logically excludes: *first, acts of guilty conduct; second, exculpatory statements; third, admission of subordinate facts that*

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> *do not constitute guilt.* Much of the confusion that exists in the case law would be readily avoided if courts carefully measured every confession by the rule of direct acknowledgment of guilt, as entirely distinguished from acts, exculpatory statements, and admissions. [emphasis added.]

See also *People v. Rockwell,* 188 Mich.App 405, 407; 470 NW2d 673 (1991). Further, "an admission of one, but not of all, the essential elements of the crime is not a confession." *Porter,* 269 Mich. at 291 (internal quotation omitted). Thus, "the *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt." *People v. Schumacher,* 276 Mich.App 165, 180–181; 740 NW2d 534 (2007).

Here, in the letter, defendant makes admissions of "subordinate facts" which circumstantially establish Kate's death, but which do not, by themselves, establish guilt to homicide. See *Porter,* 269 Mich. at 290–291. Specifically, defendant indicates that he ripped the car seat out of his car, without realizing Kate was in it, and that he thereafter held her, without trying to help her, until it was "too late" to call 911. He then describes driving for an unknown period of time to an unknown place, where he placed Kate's body in a "peaceful place" before returning home. At no point in the letter does defendant indicate that he intended to harm or kill Kate. Accordingly, because the facts admitted do not, by themselves, establish guilt, but necessarily depend upon other evidence in order to establish murder, the statements are admissions, not confessions, *Id.* at 291, and are not barred by the *corpus delicti* rule, *Schumacher,* 276 Mich.App at 180–181.

The same conclusion pertains to the other statements made by defendant. First, defendant's statements to Ruba, indicating that he did not love Kate and that he could hide a body without anyone finding it, certainly do not amount to confessions of guilt, inasmuch as they were made before Kate disappeared and do not acknowledge any guilt. See *Porter,* 269 Mich. at 290–291. Likewise, defendant's statements to Burton, indicating that he "got rid of the baby" and that "they won't find it," are similar in nature to the statements contained in defendant's letter to Courtland and amount to nothing more than the admission of "subordinate facts" which do not, by themselves, establish defendant's guilt to murder. *Id.* As such, these statements were admissible in support of defendant's open murder charge without regard to whether there was independent evidence establishing the *corpus delicti. Schumacher,* 276 Mich.App at 180–181.

***8** Based on defendant's admissions of subordinate fact in his letter and statement to Burton, there is evidence to conclude that Kate is, in fact, dead. Thus, the question becomes whether her death was the result of some "criminal agency."

In this case, Kate disappeared on June 29, 2011—over four years ago—when she was just four months old and she has not been seen since. Viewing the evidence presented at the preliminary examination, there was sufficient evidence to establish by a preponderance of the evidence that Kate's death was caused by a criminal agency. See *Brasic,* 171 Mich.App at 227. Again, the *corpus delicti* rule does not bar the use of (1) acts of guilty conduct, (2) exculpatory statements, or (3) admissions of subordinate fact. *Porter,* 269 Mich.App at 290.

Here, defendant made several exculpatory statements after Kate's disappearance. First, when he was initially asked about Kate's whereabouts, he repeatedly told the police that Courtland had her. Second, defendant later indicated that he had given Kate away for adoption.

Next, there are also numerous acts of contemporaneous guilty conduct in the record. Kate was last seen alive with defendant, whose whereabouts in the two hours after he drove away with her are unknown. During that time, defendant's cell phone was turned off. When he returned, he waited about 20 minutes to call the police. Again, when the police questioned him, he repeatedly stated that Courtland had Kate. A police search of the vehicle showed that Kate's car seat and diaper bag were in the trunk. Further, there was a soiled diaper under the front seat, even though Courtland stated that she had not left any soiled diapers in the vehicle. Additionally, the police located the outfit that Kate had been wearing before her disappearance inside defendant's pants pocket. The outfit was balled up and inside out. Moreover, the evidence at the preliminary examination showed that defendant changed his socks and shoes between when he was at the hospital and when the police spoke to him. Further, the black "Seedless" shoes he had been wearing when Kate disappeared were wet and had plant materials and dirt on them.

Finally, besides the five-page letter that defendant sent to Courtland, there were additional admissions of subordinate fact. Specifically, Burton testified that defendant told him that

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he picked up the baby, got rid of it, and that he could not be charged because there was no body.

Accordingly, taking those facts together, a jury could reasonably infer that defendant wanted to hide his involvement in Kate's death because she had died as the result of criminal agency. See *Modelski,* 164 Mich.App at 341–342. Thus, in this case, there is sufficient evidence to establish by a preponderance of the evidence that Kate died as a result of criminal agency. See *Brasic,* 171 Mich.App at 227. As such, the district court abused its discretion by refusing to bind defendant over on the charge of open murder. See *People v. Duncan,* 494 Mich. 713, 722723; 835 NW2d 399 (2013) ("A trial court necessarily abuses its discretion when it makes an error of law."). The circuit court properly reversed the district court and reinstated the charge against defendant.

***9** Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 6438333

Footnotes

1 *People v. Phillips,* unpublished order of the Court of Appeals, entered April 24, 2015 (Docket No. 326005).

2 A subsequent comparison of defendant's DNA with DNA samples taken from some of Kate's personal effects (e.g., a pacifier and bottle nipple) "revealed shared common alleles consistent with inheritance by full offspring." It was determined that defendant was 2.7 million times more likely to be Kate's father than a randomly selected individual in the Caucasian population.

3 Biological material extracted from the envelope matched defendant's DNA and expert handwriting analysis indicated that the letter was in fact written by defendant.

4 We review the district court's bindover decision de novo to determine whether the district court abused its discretion. *People v. Henderson,* 282 Mich.App 307, 313; 765 NW2d 619 (2009). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v. Unger,* 278 Mich.App 210, 217; 749 NW2d 272 (2008). We review a lower court's decision regarding *corpus delicti* for an abuse of discretion. *People v. King,* 271 Mich.App 235, 239; 721 NW2d 271 (2006).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Edward PINKNEY, Defendant-Appellant.
People of the State of Michigan, Plaintiff-Appellee,
v.
Edward Pinkney, Defendant-Appellee.

Docket Nos. 282144, 286992.
|
July 14, 2009.

Berrien Circuit Court; LC No.2005-401979-FH.

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

Opinion

PER CURIAM.

***1** Following a jury trial, defendant was convicted of giving valuable consideration to influence the manner of voting by a person, MCL 168.931(1)(a), influencing a person voting an absent voter ballot, MCL 168.932(h), and three counts of possessing, returning, or soliciting to return an absent voter ballot, MCL 168.932(f). The trial court sentenced defendant to five years' probation with a delayed jail sentence of 365 days. Subsequently, after finding that defendant violated the terms of his probation, the trial court revoked defendant's probation and sentenced him to 3 to 10 years' imprisonment. In Docket No. 282144, defendant appeals as of right his convictions. In Docket No. 286992, defendant appeals the trial court's order revoking his probation. We affirm defendant's convictions, but reverse the order revoking his probation.

I. Introduction

On February 22, 2005, the voters of Benton Harbor recalled Glen Yarbrough from his position as a city commissioner. After Yarbrough made a complaint that defendant, a community activist, had paid people $5 to vote in the recall election, the Benton County Sheriff's Department conducted an investigation into the election. The investigation led to defendant's arrest for giving valuable consideration to influence the manner of voting by a person (Count I), influencing a person voting an absent voter (AV) ballot (Count II), and possessing AV ballots (Counts III-V).

Defendant first went to trial in March 2006. After the jury was unable to reach a verdict, the trial court declared a mistrial.

After the prosecutor announced his intention to retry defendant, defendant obtained new counsel. Counsel filed numerous pretrial motions, none of which resulted in the dismissal of any charges against defendant. The pretrial motions included a motion to dismiss Counts III-V, a motion to permit defendant to question Brenda Fox, a key prosecution witness, about an alleged arrest for prostitution, a motion to exclude the utterances of two unknown persons which indicated that the persons were being paid $5 to vote, and a motion requesting an adjournment of his trial until Berrien County's jury selection procedures were reformed and he was assured of a jury venire that was drawn from a fair cross-section of the community.

Defendant went to trial for a second time in March 2007. Fox testified that defendant asked her to recruit people from the local soup kitchen to vote AV ballots in the recall election and he told her that he would pay $5 to each person that she recruited. On February 21, 2005, the day before the recall election, Fox recruited 15 people from the soup kitchen to vote an AV ballot. After defendant arrived at the soup kitchen at approximately 12:45 p.m., Fox and those she had recruited followed him to the federal building, which housed the city clerk's office. Fox took those she had recruited into the city clerk's office in groups of five. Following defendant's instruction, Fox instructed each person to mark “yes” on his or her AV ballot. When a group of five finished voting, Fox led the group back outside, where each person received $5 from defendant.

***2** There was evidence presented that the AV ballots voted by Danelle Williams, Latoyia Williams, Rosie Miles, Schelena Miles, Mary Foster, Rev. Robert Foster, Teresa Foster, Earlene Wiley, Taneka Dumas, and David Jackson had been possessed by defendant.[1] Several of the AV envelopes that accompanied the AV ballots bore Marian Anderson commemorative stamps and the stamps had not

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been cancelled. In addition, the AV envelopes had the address of the city clerk's office as the return address.

Defendant testified that, while he asked Fox to recruit people to pass out flyers and he paid $5 to those who had passed out flyers, he never asked Fox to recruit people to vote in the recall election and he had not paid anyone to vote. Defendant admitted that he provided postage stamps and address labels for people to place on AV envelopes, but he did this only to make sure that the AV ballots were returned in the mail. He testified that he never possessed an AV ballot that belonged to another person.

The jury convicted defendant on the five charges. With regard to counts III-V, the jury unanimously found that defendant had possessed the AV ballots of Danelle Williams, Latoyia Williams, and Rosie Miles.

Defendant moved for a new trial. He claimed that he was entitled to a new trial because he had been denied his constitutional rights to a public trial and to an impartial jury, he was never arraigned on the information, and because the information failed to specify which AV ballots he possessed. The trial court denied defendant's request for a new trial.

II. Right to Public Trial

On appeal, defendant argues that he was denied his sixth amendment right to a public trial when the public was required to watch jury selection in an alternate courtroom by way of a live video transmission. Specifically, defendant claims that his right to a public trial was violated because all members of the public, including his wife Dorothy Pinkney, were excluded from the courtroom, the transmission did not operate properly for a significant period of time, the transmission did not allow for adequate viewing of any prospective jurors, and the prospective jurors were referred to by number, rather than name.

A

On the morning of jury selection, before the prospective jurors were brought into the courtroom, the court officer announced that, because the courtroom would be "filled full" with prospective jurors, any member of the public who wanted to watch jury selection must proceed to an alternate courtroom, where jury selection would be shown over a live video transmission. Defendant did not object to the closure of the courtroom to the public. [2]

Defendant first objected to the closure of the courtroom in a post-conviction motion for a new trial, where he argued that the closure of the courtroom to the public violated his sixth amendment right to a public trial. Defendant claimed that the trial court's error in closing the courtroom to the public was compounded by the court's requirement that the prospective jurors be referred to by number rather than name and the fact that the live video transmission did not operate properly for a significant period of jury selection.

***3** The trial court held an evidentiary hearing, where it heard the testimony of Dorothy Pinkney and two of defendant's supporters, Mary Gault and Belinda Brown. The three women had watched jury selection from the alternate courtroom. Following the hearing, the trial court made findings of fact, including: (1) the live video transmission was faulty; the transmission was off for one to two hours, out of the five and one-half hours of jury selection; [3] (2) the members of the public watching jury selection from the alternate courtroom had a limited view of the prospective jurors; they could not see any prospective jurors sitting in the jury box; and (3) Dorothy Pinkney informed defendant of the problems with the live video transmission during the morning recess and the lunch break, but defendant did not notify the trial court of the technological problems. The trial court concluded that defendant had waived the issue whether he had been denied his right to a public trial. It reasoned that defendant never objected to its decision to require the public to watch jury selection from an alternate courtroom, never requested that any particular member of the public be allowed to remain in the courtroom, and did not inform the trial court of the technological problems with the transmission after he had learned of the problems. [4] The trial court also concluded that, because defendant had not objected to the trial court's practice of referring to prospective jurors by number, rather than name, defendant had waived any issue concerning the propriety of the practice. [5]

B

The Sixth Amendment, applicable to the states through the 14th Amendment, *Duncan v. Louisiana,* 391 U.S. 145, 148, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), provides that, "[i]n all criminal prosecutions, the accused shall enjoy the

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right to a speedy and public trial." US Const, Am VI. The Michigan Constitution also guarantees an accused the right to a public trial. Const 1963, art 1, § 20; *People v. Bails,* 163 Mich.App. 209, 210, 413 N.W.2d 709 (1987). The right to a public trial extends to jury selection. See, e.g., *Gibbons v. Savage,* 555 F.3d 112, 115 (C.A.2, 2009); *Owens v. United States,* 483 F.3d 48, 61-63 (C.A.1, 2007). The guarantee of a public trial is for the benefit of the defendant; "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia,* 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (quotation omitted).

A defendant can waive his right to a public trial. *Singer v. United States,* 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *People v. Gratton,* 107 Mich.App. 478, 481, 309 N.W.2d 609 (1981). "The right to complain about an order of exclusion may be waived either expressly or by an accused's failure to object." *Gratton, supra* at 481, 309 N.W.2d 609 (the defendant waived his right to complain about the trial court's decision to close the courtroom during the victim's testimony when the defendant failed to object to the decision). See also *People v. Hitt,* 473 F.3d 146, 155 (C.A.5, 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."); *State v. Butterfield,* 784 P.2d 153, 157 (Utah, 1989) ("[T]he failure of a defendant and his or her counsel to object to a closure order constitutes waiver of the defendant's right to public trial."). [6]

***4** Here, defendant did not object when the trial court closed the courtroom during jury selection to the public and required any member of the public who wanted to observe jury selection to watch it over the live video transmission in the alternate courtroom. At that time, defendant's failure to object to the trial court's order was a waiver of any complaint that the trial court's decision to close the courtroom to the public violated his right to a public trial. *Gratton, supra.* However, as found by the trial court, the live video transmission was faulty. The transmission was off for one to two hours. But, as also found by the trial court, defendant learned of the problems with the transmission from his wife during the first morning break, and failed to inform the trial court of the problems. We conclude that defendant's failure to inform the trial court of the faulty transmission was a continuing waiver of any complaint that the trial court's decision to close the courtroom to the public violated his right to a public trial. *Id.* In coming to this conclusion, we note that defendant was not a stranger to the legal system or to the rights afforded a criminal defendant. At trial, defendant testified that he visited the courthouse "every day." He did so "to monitor the system" and to help those at the courthouse understand their rights. Defendant, by not informing the trial court or even his attorneys of the transmission problems at a time when the problems could have been timely addressed, [7] deemed the problems to be of no concern. Consequently, defendant should not now be able to argue on appeal that he was denied his right to a public trial based on the problems with the live video transmission. See *People v. Gonzalez,* 256 Mich.App. 212, 224, 663 N.W.2d 499 (2003) ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.") (quotation omitted); *People v. Fetterley,* 229 Mich.App. 511, 520, 583 N.W.2d 199 (1998) (a defendant may not harbor error as appellate parachute).

C

We recognize that, because defendant did not affirmatively approve the trial court's decision to require the public to watch jury selection over the live video transmission in the alternate courtroom, defendant's failure to object might be viewed more appropriately as forfeiture, rather than waiver. "Waiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right." *People v. Carter,* 462 Mich. 206, 215, 612 N.W.2d 144 (2000) (quotation omitted). Forfeited error, or unpreserved error, is reviewed for plain error, which is error that is clear or obvious. *People v. Carines,* 460 Mich. 750, 763, 597 N.W.2d 130 (1999). Because defendant knew of the trial court's decision to close the courtroom to the public during jury selection and because defendant learned of the problems with the live video transmission during the morning break, we reject defendant's argument that the contemporaneous objection rule, see *People v. Hernandez,* 443 Mich. 1, 11-12, 503 N.W.2d 629 (1993), should not apply to his sixth amendment challenge. Defendant knew of the basis for his challenge at a time that, had he made an objection, the trial court could have timely addressed the problems with

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the live video transmission and potentially cured any possible violation of defendant's right to a public trial. [8]

***5** An appellate court must apply a two-step inquiry to determine whether a defendant's right to a public trial has been violated: first, the court must determine whether the closure implicates the right to a public trial; and second, if the right is implicated, the court must determine whether the closure was justified. *State v. Ndina,* 2009 WI 21, ¶ 46, 761 N.W.2d 612 (2009). [9] Not every closure of a courtroom constitutes a violation of the defendant's right to a public trial; a closure is trivial and does not implicate the constitutional right if the closure does not implicate the values served by the Sixth Amendment. *United States v. Perry,* 479 F.3d 885, 889-890 (C.A.D.C., 2007); *Peterson v. Williams,* 85 F.3d 39, 42 (C.A.2, 1996); *Ndina, supra* at ¶ 49.

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.' It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant-whether otherwise innocent or guilty-of the protections conferred by the Sixth Amendment. *[Peterson, supra* at 42.]

The right to a public trial advances four values: "1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury." *Id.* at 43. Because the public was only required to watch jury selection in the alternate courtroom, the third and fourth values are not implicated by the trial court's decision to close the courtroom to the public. See *Gibbons, supra* at 121 ("The third and the fourth values ... are not implicated by voir dire because no witnesses testified."). Thus, we look to the first two values to determine whether the trial court's decision to close the courtroom to the public during jury selection was trivial, such that it did not implicate defendant's right to a public trial.

Defendant's claim that he was denied his right to a public trial is essentially comprised of four points: (1) his wife Dorothy Pinkney was excluded from the courtroom; (2) the public's view of the prospective jurors was restricted; (3) the prospective jurors were referred to by number, rather than name; and (4) the public was completely unable to view jury selection when the live video transmission malfunctioned. Neither the second point nor the third point supports defendant's claim that he was denied a public trial. First, this Court has approved the practice of referring to jurors by number. *People v. Hanks,* 276 Mich.App. 91, 93-95, 740 N.W.2d 530 (2007); *People v. Williams,* 241 Mich.App. 519, 522-525, 616 N.W.2d 710 (2000). Second, there is no guarantee that, even when viewing court proceedings in the actual courtroom, any given member of the public will have an unobstructed view of all happenings in the courtroom. This is especially true where, as it was in the present case, the seating area outside the bar is filled to capacity and people are sitting on portable chairs inside the bar. Consequently, we find the fact that the public had a restricted view of the prospective jurors to be of no significant import. Regarding his first point, defendant cites *In re Oliver,* 333 U.S. 257, 271-272, 68 S.Ct. 499, 92 L.Ed. 682 (1948), where the United States Supreme Court stated that "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present." However, we do not read this statement in *Oliver* as broadly as defendant does; we do not read it as a requirement that a defendant's family members must be allowed to remain in the courtroom. In *Oliver,* the Supreme Court was concerned with whether a defendant could be tried and convicted in grand jury secrecy, and the Court made the above statement in discussing this country's distrust of secret trials. The Court did not hold that an accused is always, and under all circumstances, entitled to have his family members in the courtroom.

***6** The most problematic of defendant's four points is that the public was completely unable to view jury selection during the times when the live video transmission malfunctioned. When the transmission malfunctioned, jury selection was completely closed to the public. However, the trial court did not intend for any portion of jury selection to be conducted away from the oversight of the public. It is true that the trial court excluded the public from the courtroom during jury selection. But, by setting up the live video transmission, the trial court gave the public the opportunity to watch jury selection. In addition, as acknowledged by defendant, the malfunctions in the transmission were inadvertent. The malfunctions were due to technological problems. And, on the record before us, there is no indication that either the trial court or the prosecutor knew of the malfunctions. Thus, the trial court and the prosecutor were not aware that portions of jury selection were, in all actuality, conducted in secret. Because the trial court did not intend for jury selection to

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be conducted away from the oversight of the public, and because neither the trial court nor the prosecutor knew that portions of jury selection were conducted in secret, we do not believe that the first and second values advanced by the right to a public trial were implicated to an extent that defendant's right to a public trial was infringed. The public was only excluded from the courtroom for jury selection, the technological problems were inadvertent and did not preclude the public from observing the majority of jury selection, and because the trial court and the prosecutor believed that their actions were being observed by the public, they were kept "keenly alive to a sense of their responsibility and to the importance of their functions." *Waller, supra.* Accordingly, defendant has not established that the trial court's decision to close the courtroom to the public during jury selection violated his right to a public trial.

D

Defendant claims that, if we determine that his sixth amendment claim is unpreserved, he was denied the ineffective assistance of counsel based on counsel's failure to preserve the issue. He asserts that, because counsel "was not able to observe and object to any problems with the public's view of the jury selection, counsel was prevented from assisting him during a critical stage in the proceedings." Defendant further asserts that, pursuant to *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), prejudice must be presumed.

A defendant is guaranteed the right to counsel at all critical stages of the criminal process. *People v. Willing,* 267 Mich.App. 208, 219, 704 N.W.2d 472 (2005). The right to counsel includes the right to the effective assistance of counsel. *People v. Cline,* 276 Mich.App. 634, 637, 741 N.W.2d 563 (2007). When a defendant is "denied" the right to counsel at a critical stage of the proceedings, counsel's performance is deemed so deficient that prejudice is presumed. *Cronic, supra* at 659; *People v. Murphy,* 481 Mich. 919, 921, 750 N.W.2d 582 (2008) (Markman, J., concurring). A defendant has been "denied" his right to counsel if "counsel was totally absent, or prevented from assisting" the defendant. *Cronic, supra* at 659 n. 25. Defendant's claim that he was denied the effective assistance of counsel because counsel was unable to assist him during jury selection is without any merit. Counsel was present for and conducted jury selection.

III. Right of Confrontation and Right to Present a Defense

***7** Defendant contends that he was denied his right of confrontation when the trial court limited his cross-examination of Brenda Fox regarding an alleged prior arrest for prostitution. Defendant also claims that he was denied his right to present a defense when the trial court prohibited him from questioning Doug Bragg, a defense witness, who claims that he saw Fox arrested for prostitution, about the alleged arrest. Defendant acknowledges that the trial court permitted him to question Fox and Bragg about Fox's alleged statement to Bragg that, as long as she testified against defendant, she did not have to worry about being arrested by the police, but claims that the trial court violated his constitutional rights by not allowing him to present the circumstances surrounding the alleged statement. According to defendant, Fox made the alleged statement after she was released from her arrest for prostitution.

A

We review a trial court's evidentiary decisions for an abuse of discretion. *People v. Unger,* 278 Mich.App. 210, 216, 749 N.W.2d 272 (2008). However, we review de novo whether a defendant was denied his constitutional rights to confrontation and to present a defense. *Id.* at 247, 749 N.W.2d 272; *People v. McPherson,* 263 Mich.App. 124, 131, 687 N.W.2d 370 (2004).

B

In a pretrial motion in limine, defendant, alleging that Fox had been arrested for prostitution while the police were investigating defendant's actions in the recall election, moved for an order permitting discovery into the arrest and allowing him to cross-examine Fox about the arrest. In response, the prosecutor stated that he had checked the Berrien County Criminal Justice System and the Law Enforcement Information Network and had not found any information relating to an arrest of Fox for prostitution. At the hearing on the motion, the trial court asked defendant if he had any evidence to support his claim that Fox had been arrested. Defendant stated that he did not, and the trial court denied the motion. Thereafter, defendant filed a motion for rehearing.

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Attached to the motion was an affidavit from Bragg. Bragg averred that, on April 22, 2005, he saw Fox working the streets as a prostitute when she was arrested and placed inside a police car. Bragg further averred that the police car drove off and 20 minutes later, Fox returned and told him that she no longer had to worry about being arrested for prostitution. The trial court did not rule on the motion for rehearing before trial. [10]

During cross-examination of Fox, defendant asked her if she had ever told Bragg that she was free to do what she wanted on the streets because the police would not arrest her. The prosecutor objected, and a lengthy bench conference ensued. Defense counsel informed the trial court that, in addition to the question already asked, he intended to ask Fox if she had been arrested for prostitution in front of Bragg. The trial court acknowledged that the questions defendant sought to ask Fox had to do with Bragg's affidavit. Unfortunately, portions of the bench conference are listed as "inaudible," and much of what was stated by the trial court and the parties cannot be understood. In particular, any specific ruling by the trial court on the prosecutor's objection is unknown. However, near the end of the bench conference, the trial court stated to defense counsel, "I thought it was clear you were not gonna get in this issue about prostitution." Defense counsel responded, "Well, I'm gonna stay away from it, Your Honor." Thus, it appears that defendant agreed or was instructed by the trial court to limit his inquiry to whether Fox told Bragg that, as long as she testified against defendant, she could do anything she wanted on the streets.

***8** After the bench conference, defendant asked Fox if she had told Bragg that she could do anything she wanted on the streets of Benton Harbor and she would not be arrested as long as she testified against defendant. Fox denied making such a statement to Bragg. Defendant did not ask Fox whether she had been arrested for prostitution. During examination of Bragg, defendant asked if Fox had ever told him that, as long as she testified against defendant, she would not have any problems with the police. Bragg replied that Fox had made such a statement to him. The trial court then called the parties up to the bench, and inquired whether defendant intended to ask Bragg about Fox's prostitution, to which defense counsel replied, "No, no, no, no." And, indeed, defendant did not ask Bragg whether, shortly before he heard Fox's statement, he observed Fox being arrested for prostitution.

C

Defendant was allowed to question Fox and Bragg regarding whether Fox told Bragg that, as long as she testified against defendant, she could do whatever she wanted on the streets without fear of being arrested. Thus, as acknowledged by defendant, the question is whether defendant was denied his constitutional rights to confrontation and to present a defense when, as he claims, the trial court prohibited him from questioning Fox and Bragg about the context of the alleged statement.

"Bias is a common-law evidentiary term used 'to describe the relationship between a party and a witness ... in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.' " *People v. Layher,* 464 Mich. 756, 762, 631 N.W.2d 281 (2001), quoting *United States v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Bias is almost always relevant, because the jury is entitled to assess all evidence that bears on the accuracy and truthfulness of a witness's testimony. *Id.* at 763-764. If Fox made the alleged statement, the statement evidences a bias by Fox in favor of the prosecution. Because Fox did not need to fear any arrest by the police for her activities on the streets if she testified against defendant, the jury could infer that Fox's testimony was slanted in the prosecution's favor. And, it cannot be denied that the context of the alleged statement-that Fox had been arrested for prostitution and made the statement soon after she had been released-would have provided the jury with additional facts from which to assess the bias of Fox. The context of the statement may have provided additional weight to any inference that Fox slanted her testimony in favor of the prosecution.

A criminal defendant has the right to be confronted with the witnesses against him. *People v. Yost,* 278 Mich.App. 341, 369, 749 N.W.2d 753 (2008); US Const, Am VI; Const 1963, art 1, § 20. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska,* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (quotation omitted and emphasis deleted). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall,* 475 U.S. 673, 678-679, 106 S.Ct.

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1431, 89 L.Ed.2d 674 (1986) (quotation omitted). See also *People v. Kelly,* 231 Mich.App. 627, 644, 588 N.W.2d 480 (1998) ("A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation.").

> ***9** It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (per curiam) (emphasis in original). *[Van Arsdall, supra* at 679.]

Because the record is unclear whether defendant agreed to limit his inquiry into Fox's alleged arrest for prostitution or whether the trial court imposed the limitation on him and, if so, its reasoning for imposing the limitation, it is impossible for us to reach a conclusion on whether defendant's right of confrontation was violated. [11] However, we need not address plaintiff's argument that, because defendant failed to provide a complete record on appeal, pursuant to MCR 7.210(B), defendant has waived the issue. If the trial court violated defendant's right of confrontation, the error was harmless.

D

A violation of a defendant's right of confrontation is subject to a harmless error analysis. *Van Arsdall, supra* at 684. We need not reverse a conviction based on a denial of the defendant's right of confrontation if the error was harmless beyond a reasonable doubt. *People v. Bell (On Second Remand),* 264 Mich.App. 58, 63, 689 N.W.2d 732 (2004). Whether an error is harmless beyond a reasonable doubt depends on a variety of factors, "including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Kelly, supra* at 644-645, 588 N.W.2d 480.

Fox was the prosecutor's main witness on the Counts I and II. [12] Defendant presented several witnesses, including himself, to discredit Fox's testimony. Mattie Smith testified that she was at the soup kitchen on February 21, 2005, and heard Fox announce that defendant would pay five to ten people $5 to pass out flyers. She did not hear Fox say anything about people getting paid to vote. Harold Farmer acknowledged that he had voted an AV ballot on February 21, 2005, but testified that he had not been paid to vote. [13] He also testified that he did not hear any talk about being paid to vote. Bragg testified that he saw Fox at the soup kitchen on February 21, 2005, and he did not hear any talk about paying people to vote. Defendant testified that he had never asked Fox to recruit people to vote; rather, he had asked her to recruit ten to 15 people to pass out flyers, and that he had never paid anyone to vote. In addition, Fox's testimony that defendant asked her to recruit people to vote and that he would pay each person $5 to vote was impeached by an affidavit that Fox had signed in March 2005. In the affidavit, Fox claimed that she "was told by [defendant] to recruit 10 to 15 people to pass out flyers and they would be paid five dollars for their service." Fox further claimed in the affidavit that defendant repeatedly told the people who were passing out flyers that he was not paying them to vote. [14] Further, the jury was presented with evidence from which it could infer that Fox was biased in favor of the prosecution. During defendant's cross-examination of Fox, the trial court instructed the jury on MCL 168.942, which granted immunity to Fox for any election law crimes to which her testimony related. [15] And, Fox testified that MCL 168.942 meant that she was to tell the truth and that she would not go to prison. Finally, it must not be forgotten that Fox's testimony that she never told Bragg that, as long as she testified against defendant, she could do whatever she wanted in the streets and not be arrested was impeached by Bragg's testimony that Fox had made such a statement to him. Accordingly, the evidence from which the jury could find that Fox's testimony was not truthful was plentiful. Yet, the jury, as evidenced by its verdict, found Fox to be credible. Because the jury found Fox credible, in spite of the evidence suggesting that she was biased in favor of the prosecution or that her testimony was not truthful, we are firmly convinced that any error by the trial court in excluding the context of Fox's alleged statement to Bragg

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was harmless beyond a reasonable doubt. *Bell, supra.* The only portion of any testimony regarding the context of Fox's alleged statement to Bragg that would not be cumulative of the fact that Fox received immunity under MCL 168.942 would be that Fox received immunity for acts of prostitution. We believe that it is clear beyond a reasonable doubt that knowledge by the jury that Fox may have received immunity for acts of prostitution would not have altered the jury's credibility determinations, given that the jury chose to believe Fox in light of the plentiful evidence suggesting that Fox's testimony was not truthful.

E

***10** A criminal defendant has a constitutional right to present a defense. US Const, Am VI; Const 1963, art 1, § 20; *Yost, supra* at 379, 749 N.W.2d 753. Assuming that the trial court erred when it prevented defendant from introducing Bragg's testimony that he observed Fox being arrested for prostitution and that Fox made her alleged statement approximately soon after she was released, the trial court's error did not rise to a violation of defendant's constitutional right to present a defense, because defendant was not totally precluded from challenging Fox's bias and credibility. See *People v. Steele,* --- Mich.App ----; --- NW2d ---- (2009). [16] The jury was instructed that, pursuant to MCL 168.942, Fox received immunity for election law crimes to which her testimony related. Defendant also presented witnesses who provided testimony that impeached and contradicted the testimony of Fox. Accordingly, defendant was free to argue to the jury that Fox's testimony was not truthful. Defendant was not denied his constitutional right to present a defense.

IV. MCL 168.932

Defendant argues that the trial court erred in denying his motion to dismiss and motion for a directed verdict on Counts III-V. Specifically, defendant claims that the trial court, because it held that MCL 168.932(f) only requires proof that an accused knowingly possesses an AV ballot of another person, erred in concluding that a violation of MCL 168.932(f) is a general intent crime, rather than a strict liability crime. According to defendant, a general intent crime requires proof that the accused knew that his actions were illegal. Defendant also claims that counsel was ineffective for failing to request a proper *mens rea* jury instruction. In addition, defendant argues that, because MCL 168.932(f) imposes strict liability, the statute violates due process and impermissibly infringes on first amendment activity. Defendant further claims that MCL 168.932(f) is unconstitutional pursuant to the overbreadth doctrine.

A

"[W]hether a statute imposes strict liability or requires proof of a *mens rea,* that is, a guilty mind," involves an issue of statutory interpretation. *People v. Lardie,* 452 Mich. 231, 239, 551 N.W.2d 656 (1996), overruled in part on other grounds *People v. Schaefer,* 473 Mich. 418, 703 N.W.2d 774 (2005). We review de novo issues of statutory interpretation. *People v. Tombs,* 472 Mich. 446, 451, 697 N.W.2d 494 (2005). We also review de novo issues concerning a statute's constitutionality. *People v. Hrlic,* 277 Mich.App. 260, 262, 744 N.W.2d 221 (2007).

B

The Supreme Court, in *Lardie, supra* at 240-241, 551 N.W.2d 656, explained the difference between specific intent and general intent, as well as the difference between a strict liability crime and a general intent crime:

> Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself. For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know. On this basis, the distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of whether

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> he intended to perform it. [Citations omitted.]

***11** To determine whether MCL 168.932(f) imposes strict liability or requires proof of a *mens rea,* we must begin with the language of the statute. *Tombs, supra* at 451, 697 N.W.2d 494. MCL 168.932 provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> * * *
>
> (f) A person other than an absent voter; a person whose job it is to handle mail before, during, or after being transported by a public postal service, express mail service, parcel post service, or common carrier, but only during the normal course of his or her employment; a clerk or assistant of the clerk; a member of the immediate family of the absent voter including father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild; or a person residing in the absent voter's householder shall not do any of the following:
>
> (i) Possess an absent voter ballot mailed or delivered to another person, regardless of whether the ballot has been voted.
>
> (ii) Return, solicit to return, or agree to return an absent voter ballot to the clerk of a city, township, village, or school district.

A person who violates MCL 168.932(f) shall be punished by a fine not exceeding $1,000, a term of imprisonment not exceeding five years, or both. MCL 168.935.

The Legislature did not expressly include language in MCL 168.932(f) indicating that *mens rea,* or criminal intent, is an element of the crime. However, "[i]n interpreting a statute in which the Legislature has not expressly included language indicating that fault is a necessary element of a crime, this Court must focus on whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt." *Lardie, supra* at 239, 551 N.W.2d 656. Because criminal intent is normally an element of a crime and because statutes that create strict liability for all their elements are disfavored, this Court presumes that, absent a clear indication that the Legislature intended to dispense with the *mens rea* requirement, the Legislature's silence suggests that it did not intend to eliminate the requirement. *Tombs, supra* at 451, 456-457, 697 N.W.2d 494. Factors this Court looks at to determine whether the Legislature intended to require a *mens rea* element include the specific terms and phrases used in the statute, the Legislature's goal in enacting the statute, the severity of the punishment, and the difficulty encountered by prosecutors in proving a criminal intent. See *Tombs, supra* at 457-458, 697 N.W.2d 494; *People v. Schumacher,* 276 Mich.App. 165, 171, 740 N.W.2d 534 (2007); *People v. Nasir,* 255 Mich.App. 38, 43-45, 662 N.W.2d 29 (2003). [17]

Consideration of these factors establishes that the Legislature intended that MCL 168.932(f) contain a *mens rea* element. The active verbs used in MCL 168.932(f), "[p]ossess," "[r]eturn," "solicit to return," and "agree to return," contemplate knowing, intentional conduct on the part of the defendant. In addition, the Legislature enacted MCL 168.932(f) to ensure the integrity of the absentee voting process. Before the enactment of MCL 168.932(f), any registered voter could return the AV ballot of an absentee voter if a family member or person residing with the absentee voter was not available, and this led to abuse by campaign workers who were eager to "assist" absentee voters. See House Legislative Analysis, HB 4242, October 17, 1995. The intent of the Legislature to stop abuse in the absentee voting process would not be furthered by reading MCL 168.932(f) as a strict liability crime. For example, if MCL 168.932(f) was read as a strict liability crime, then a person who carried his neighbor's AV ballot from his mailbox into his home because a postal worker placed the AV ballot in the wrong mailbox would be subject to prosecution. Prosecution of this person, or any person who unknowingly possesses an AV ballot belonging to another person, is not necessary to further the Legislature's intent. Further, the punishment for a violation of MCL 168.932(f) is severe: a person who violates the statute is guilty of a felony [18] and subject to a prison term of five years. Finally, although a person's intent may be difficult to prove, only minimal circumstantial evidence is needed to prove a defendant's state of mind. *People v. McRunels,* 237 Mich.App. 168, 181, 603 N.W.2d 95 (1999). Prosecutors should face no undue hardships in proving, through minimal circumstantial evidence, that a defendant intended to possess an AV ballot belonging to another person. For the above reasons, we conclude that the Legislature intended that MCL 168.932(f) contain a *mens rea* element. Accordingly, the trial

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court did not err in holding that MCL 168.932(f) is a general intent crime.

***12** In addition, contrary to defendant's argument, the trial court did not err in holding that the prosecution was not required to prove that defendant knew that possession of an AV ballot belonging to another person was a crime. Our Supreme Court, in its most recent explanation of the *mens rea* element of a general intent crime, explained that "general intent is merely the intent to perform the physical act itself" and that "for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act." *Lardie, supra* at 240-241, 551 N.W.2d 656. In addition, this Court has repeatedly stated the same. See *People v. Motor City Hosp. & Surgical Supply, Inc.,* 227 Mich.App. 209, 215, 575 N.W.2d 95 (1997) ("The instant offense is a general intent, not a specific intent, crime. The requisite intent is the intent to do the prohibited physical act."); *People v. Combs,* 160 Mich.App. 666, 673, 408 N.W.2d 420 (1987) ("Carrying a concealed weapon is a general intent crime. The only intent necessary is an intent to do the act prohibited, to knowingly carry the weapon on one's person or in an automobile."). As explained by Justice Ginsburg, "The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.' " *Staples v. United States,* 511 U.S. 600, 622 n. 3, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (Ginsburg, J., concurring), quoting *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Accordingly, defendant's argument that, if the prosecutor is not required to show that he knew that possession of an AV ballot belong to another person was a crime, MCL 168.932(f) is a strict liability crime, rather than a general intent crime, is without merit. [19]

C

Because MCL 168.932(f) is a general intent crime and does not require proof that a defendant knew possession of an AV ballot belonging to another person was a criminal act, counsel was not ineffective for failing to request a jury instruction that before convicting defendant of Counts III-V, the jury must find that defendant knew possession of AV ballots was criminal. Counsel is not required to make a futile motion. *People v. Fike,* 228 Mich.App. 178, 182, 577 N.W.2d 903 (1998).

D

Based on his argument that MCL 168.932(f) imposes strict liability, defendant argues that the statute is unconstitutional because it violates due process and impinges on first amendment activity. Defendant claims that MCL 168.932(f) violates due process because "it: (a) involves a *malum prohibitum* act; (b) does not contain a requirement that the offender have any type of scienter or criminal intent as required by the general common law rule that there may be no criminal activity with a 'vicious will' or 'guilty mind;' [sic] and (c) imposes liability for a 5-year felony." [20] Defendant claims that MCL 168.932 impinges on first amendment activity because, "imposing strict liability for possession of absentee voter ballots, without any requirement that the possessor know [sic] that the law forbids the possession, will chill the associational rights related to voting and election campaigning." Because defendant's constitutional arguments are based on the incorrect assertion that a violation of MCL 168.932(f) is a strict liability crime, the arguments are unavailing.

***13** Defendant also claims that MCL 168.932(f) is unconstitutional pursuant to the overbreadth doctrine because (1) it prohibits the consensual possession of AV ballots and (2) it criminalizes conduct that is protected by federal law, 42 USC 1973aa-6. Defendant has not properly presented this issue for appellate review. In claming that MCL 168.932(f) criminalizes conduct protected by federal law, defendant merely quotes 42 USC 1973aa-6. And, in claiming that MCL 168.932(f) is unconstitutional because it prohibits the consensual possession of AV ballots, defendant relies solely on a federal district court case from Texas, *Ray v. Texas,* unpublished findings of fact and conclusions of law, issued October 31, 2006 (ED Tex, No. 2:06-CV-385). This case is of no value to defendant. The case is unpublished and the Fifth Circuit stayed the preliminary injunction granted by the court. [21] See *Ray v. Abbott,* 2008 WL 104262 (C.A.5, 2008). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly, supra* at 640-641, 588 N.W.2d 480. The failure to properly address the merits of an alleged error constitutes abandonment of the

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issue. *People v. Harris,* 261 Mich.App. 44, 50, 680 N.W.2d 17 (2004). Accordingly, defendant has abandoned the issue, and we decline to address it.

V. Hearsay

Defendant claims that the trial court erred in admitting the utterances of unknown persons who appeared at the city clerk' office on February 21, 2005. The utterances of the unknown persons, which were heard by Kimberly Thompson and Lesia Rolling, employees of the city clerk's office, indicated that the persons were expecting to be paid $5 to vote. Specifically, defendant claims that the utterances were hearsay because they involved assertions and were not admissible under MRE 804(b)(3), the hearsay exception for statements against penal interests. [22]

A

We review preserved claims of nonconstitutional evidentiary error for an abuse of discretion. *Carines, supra* at 774, 597 N.W.2d 130; *People v. Lukity,* 460 Mich. 484, 488, 596 N.W.2d 607 (1999). A trial court abuses its discretion when it fails to select a reasonable and principled outcome. *People v. Babcock,* 469 Mich. 247, 269, 666 N.W.2d 231 (2003). We review an unpreserved claim of error for plain error affecting the defendant's substantial rights. *Carines, supra* at 763, 597 N.W.2d 130.

B

Before trial, defendant moved in limine to exclude the utterances of the unknown persons. The trial court did not rule on the motion; rather, it outlined the legal framework that it would use during trial to analyze the admissibility of the utterances. The trial court opined that the utterance, if they were questions, would not be assertions under MRE 801(a) and, thus, not subject to the rules of hearsay. The trial court also opined that the utterances, if they were assertions, might be admissible under MRE 804(b)(3) if the declarants were unavailable. The trial court further speculated that the utterances might be admissible either under the rule of completeness because the utterances were part of the res gestae or under MRE 404(b) because the utterances were part of a common plan by defendant. The trial court withheld a decision on the admissibility of the utterances pending resolution of the issues whether the utterances were questions and whether the declarants were unavailable.

***14** At trial, the prosecutor asked Thompson if any of the individuals who came into the city clerk's office on February 21, 2005, asked unusual questions. Defendant objected, arguing that Thompson's answers would include hearsay. The trial court excused the jury, and asked the prosecutor to inform it of Thompson's testimony. The prosecutor replied that Thompson would testify that two people asked, “Where do I get my $5 dollars?” or “Is this where I get paid?” The trial court ruled that if that was Thompson's testimony, then the utterances of the unknown persons were questions and not subject to the hearsay rules.

After the bench conference, the prosecutor elicited, without any further objection by defendant, the following testimony from Thompson:

> *Q.* My question before we took the break was on February 21st, 2005, when all those individuals were coming in at one time in the afternoon and you indicated you had a large group ...
>
> *A.* Yes.
>
> *Q.* ... and I asked if there were any questions that were posed to you?
>
> *A.* Yes.
>
> *Q.* And what were the-what was the question?
>
> *A.* Someone is supposed to be paying me $5 dollars [sic] to vote.

* * *

> *Mr. Davis.* What did you say again? I-I didn't understand.
>
> *The Witness.* Someone is supposed to be paying me $5 dollars [sic] to vote.
>
> *Mr. Davis.* They said that?
>
> *The Witness.* Yes.
>
> *Mr. Davis.* As a statement?

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The Witness. They said it directly to me.

* * *

Q. Did anybody else have an unusual question for you or anybody else in your office?

A. Yes.

* * *

Q. What was the question?

A. They needed to know where to go get their $5 dollars [sic] to vote.

Q. You heard that question twice that afternoon?

A. Yes.

On cross-examination, Thompson clarified that the second unusual question she heard was "Where do I get my $5 dollars?" Thompson did not know the persons who made the utterances.

The prosecutor also asked Rolling if she heard any unusual conversations on February 21, 2005. The trial court, over defendant's hearsay objection and after inquiring from the prosecutor if he expected "the same kind of answer," allowed Rolling to answer the question. Rolling testified that she heard "[s]omeone asking about $5 dollars [sic]." On cross-examination, Rolling testified that the person had voted an AV ballot and then said that "she was told she would receive $5 dollars [sic] for voting her ballot." Rolling, like Thompson, did not know who inquired of the $5.

C

Hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 802. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). An assertion is capable of being true or false. *People v. Jones (On Rehearing After Remand),* 228 Mich.App. 191, 204-205, 579 N.W.2d 82 (1998), modified 458 Mich. 862, 587 N.W.2d 637 (1998) (the command "Bitch, come out" was not capable of being true or false and, therefore, it was not a "statement"). In addition, this Court has rejected the "implied assertion" theory of hearsay. *Id.* at 207, 225-226, 579 N.W.2d 82. [23]

***15** After receiving the prosecutor's offer of proof of the testimony of Thompson and Rolling regarding the utterances, the trial court did not abuse its discretion in allowing Thompson and Rolling to testify to the utterances. The prosecutor informed the trial court that Thompson and Rolling would testify that the unknown persons asked, "Where do I get my $5 dollars?" and "Is this where I get paid?" The offer of proof established that the utterances of the unknown persons were questions. As questions, which are incapable of being true or false, the utterances were not assertions. *Jones, supra* at 204-205, 579 N.W.2d 82. Because the utterances were not assertions, the utterances were not statements and, therefore, not subject to the rules of hearsay. MRE 801(a), (c); MRE 802. In addition, any assertion implied from the questions that the unknown speakers were being paid to vote cannot be considered hearsay, as the "implied assertion" theory of hearsay has been rejected by the Court. *Jones, supra* at 207, 225-226, 579 N.W.2d 82.

However, the testimony of Thompson and Rolling did not correspond to the offer of proof. Although one utterance as testified by Thompson was a question-"Where do I get my $5 dollars?" [24] -the other utterance as testified by Thompson and the utterance as testified by Rolling were not questions. The issue whether the trial court erred in failing to strike the testimony of Thompson and Rolling regarding the utterances that were not questions is unpreserved, because defendant did not object during the testimony of Thompson and Rolling See MRE 103(a) (a defendant must make a timely objection); *People v. Pipes,* 475 Mich. 267, 277, 715 N.W.2d 290 (2006) ("In order to properly preserve an issue for appeal, a defendant must raise objections at a time when the trial court has an opportunity to correct the error.") (quotation omitted).

The utterances of the unknown persons that were not questions were assertions. The utterances, "Someone is supposed to be paying me $5 to vote" and "[I] was told that [I] would receive $5 dollars for voting," were capable of being true or false. *Jones, supra* at 204-205, 579 N.W.2d 82. In addition, the utterances were offered for the truth of the matter asserted, i.e., that the unknown persons would be paid

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$5 for voting an AV ballot. Because these utterances were not questions and were offered for the truth of the matter asserted, the trial court plainly erred in failing to strike the testimony of Thompson and Rolling regarding the utterances. *Carines, supra.*

In addition, to the extent that the trial court would have admitted the assertive utterances under MRE 804(b)(3), the trial court would have erred. MRE 804(b)(3) provides that, if the declarant is unavailable, the following is not excluded by the hearsay rule:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true....

***16** A declarant is unavailable if he or she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). For a witness to be deemed unavailable under MRE 804(a)(5), the prosecution must have made a diligent good-faith effort in its attempt to locate the witness. *People v. Bean,* 457 Mich. 677, 684, 580 N.W.2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case." *Id.*

Here, the record contains no indication that the prosecutor made any attempts to learn the identity of the persons who made the utterances, despite knowing the persons who voted AV ballots at the city clerk's office on February 21, 2005. At trial, the prosecutor admitted into evidence 19 AV applications and AV envelopes that were "initialed in" by Thompson between 1:03 p.m. and 2:12 p.m. Nothing in the record suggests that the prosecutor made any attempts to ascertain whether any of these 19 people had made the utterances. [25] Accordingly, because the prosecutor made no attempts to learn the identity of the speakers of the utterances, any conclusion that the prosecutor used due diligence in procuring the attendance of the speakers would have been an abuse of discretion. *Id.* (a trial court's determination whether a prosecutor made good faith effort in attempting to locate a witness is reviewed for an abuse of discretion). We simply do not believe that, because the identity of a declarant is unknown, the declarant is necessarily unavailable under MRE 804(a)(5). Where means are available for the prosecutor to attempt to learn the identity of an unknown declarant, the prosecutor must make a diligent good-faith effort at learning the identity of the declarant.

The trial court's error in admitting the assertive utterances of the unknown declarants does not require reversal of defendant's convictions on Counts I and II. [26] We reach this conclusion whether utilizing the standard for unpreserved error, *Carines, supra* at 763, 597 N.W.2d 130, or the standard for preserved nonconstitutional error, *Lukity, supra* at 495-496, 596 N.W.2d 607. [27] In determining whether an error is prejudicial, we must focus on the nature of the error and assess its effect in light of the weight and strength of the untainted evidence. *People v. Swint,* 225 Mich.App. 353, 379, 572 N.W.2d 666 (1997). As previously stated, Fox was the prosecutor's main witness for Counts I and II, and Fox's credibility was suspect. The utterances that were erroneously admitted, because they corroborated Fox's testimony that she had been asked by defendant to recruit people to vote and that he would give $5 to each person she recruited, had the ability to influence the jury's credibility determinations. However, other evidence also corroborated Fox's testimony. The utterance that was heard by Thompson that was a question, "Where do I get my $5?" corroborated Fox's testimony. In addition, Laura Rittmon testified that, after having a conversation with Fox at the soup kitchen, she went to the city clerk's office, signed her named on a piece of paper, and after she went outside, received $5 from defendant. Further, Thompson testified that she saw Fox in the city clerk's office on February 21, 2005, during the same time that a lot of people came in to vote an AV ballot. Because Fox's testimony was corroborated by evidence other than the erroneously admitted utterances, we do not believe that the trial court's error affected the outcome of the proceedings, *Carines, supra* at 763, 597 N.W.2d 130, or that, more probable than not, it was outcome determinative. *Lukity, supra* at 495-496, 596 N.W.2d 607.

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VI. The Information

***17** Defendant claims that he was denied due process because the information, as to Counts III-V, failed to specify which AV ballots defendant possessed. Defendant asserts that, because 242 AV ballots were cast in the recall election and because he was not given notice of which AV ballots he was alleged to have possessed, he was unable to prepare a defense. Defendant also asserts that the information is insufficient to allow him to claim any double jeopardy protections in future prosecutions.

A

Defendant first objected to the information in a post-conviction motion for a new trial. Consequently, because the laws governing indictments apply to informations, MCL 767.2, our review of defendant's claim is governed by MCL 767.76. The first sentence of MCL 767.76 provides:

> No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, *nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit.* [Emphasis added.]

Pursuant to MCL 767.76, because defendant did not object to the information before commencement of trial, we may not reverse defendant's convictions based on any defect in the information.

B

Nonetheless, because defendant did not object to the information before trial, any review of his claim that the information was constitutionally deficient because it failed to specify which AV ballots he possessed is for plain error affecting his substantial rights. *Carines, supra* at 763, 597 N.W.2d 130. Error affects a defendant's substantial rights if the error was prejudicial. *Id.* Under this standard, defendant is not entitled to a reversal of his convictions on counts III-V.

"[A]n [information] is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). In the information, Counts III-V read:

> [T]he defendant:
>
> * * *
>
> did possess an absent voter ballot that was mailed or delivered to another person and/or return, solicit to return, or agree to return another person's absent voter ballot to the clerk of a city, township, village, or school district; contrary to MCL 168.932(f)[.]

The information used the words of MCL 168.932(f) to set forth the charges. It did not set forth any of the specifics of the charged offenses; as pointed out by defendant, it did not set forth whose AV ballots defendant possessed. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence coming under the general description, with which he is charged." *Hamling, supra* at 117-118 (quotation omitted).

***18** Even if we accept defendant's argument that the information was deficient because it failed to specify which AV ballots he possessed, defendant cannot establish that the information was or will be prejudicial. First, defendant had actual notice of the AV ballots that he was charged with possessing. After the preliminary examination, the trial court provided a written opinion and order, in which it stated that it was granting the prosecution's motion to bind defendant

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over on Counts III-V on theories that he possessed the AV ballots of Taneka Dumas, Mary Foster, Rev. Robert Foster, Teresa Foster, Schelena Miles, and Rosie Miles. For reasons not apparent on the record, at defendant's first trial, the prosecution claimed that defendant possessed the AV ballots of ten people. The prosecution argued that, in addition to possessing the AV ballots of the six people already listed, defendant possessed the AV ballots of David Jackson, Latoyia Williams, Danelle Williams, and Earlene Wiley. At defendant's second trial, the prosecution claimed that defendant possessed the AV ballots of the same ten people. Thus, contrary to defendant's claim, he was not required to prepare a defense regarding all 242 AV ballots that were cast in the recall election. Based on the trial court's opinion and order following the preliminary examination and on the evidence presented at his first trial, defendant had actual knowledge of the ten AV ballots that he was alleged to have possessed. Second, defendant can look to the jury verdict to determine whether a subsequent prosecution is barred by double jeopardy. See *Russell v. United States,* 369 U.S. 749, 764, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (a defendant may look beyond the information and rely on other parts of the record to determine whether double jeopardy bars a subsequent prosecution). In rendering its verdict, the jury stated that it found beyond a reasonable doubt that defendant possessed the AV ballots of Danelle Williams, Rosie Miles, and Latoyia Williams.[28] Accordingly, any deficiency in the information did not affect defendant's substantial rights at trial, nor will it affect his ability to seek double jeopardy protection in a future prosecution.

VII. Sufficiency of the Evidence

Defendant argues that his convictions for possessing the AV ballots of Danelle Williams and her sister, Latoyia Williams, are not supported by sufficient evidence. Specifically, defendant claims that because the sisters were unsure about the paperwork that they gave defendant, there was insufficient evidence from which the jury could find that defendant possessed the sisters' AV ballots, as opposed to AV ballot applications. We review a challenge to the sufficiency of the evidence de novo. *Cline, supra* at 642, 741 N.W.2d 563. We must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

***19** Although Danelle testified that she could not specifically remember what papers she gave defendant, her testimony indicated that she handed her AV ballot to defendant. Danelle testified that, after she filled out an AV application, she received an AV ballot in the mail. She filled out the papers that were inside the envelope, and put the papers back in the envelope. She then called defendant to pick up the AV ballot, because defendant had instructed her to call as soon as she voted "yes." When defendant arrived, Danelle handed him the envelope. In addition, Danelle testified that she did not affix to the AV envelope either the stamp or the two labels that were on the envelope. The stamp, a Marian Anderson stamp, was the same stamp that was on several of the other AV envelopes that defendant was alleged to have possessed. Similarly, the return address label, which had the address of the city clerk's office, was the same label that was on other AV envelopes that defendant was alleged to have possessed. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that Danelle gave defendant her AV ballot.

Although Latoyia testified that she believed she received an AV application and an AV ballot in the mail on the same day, which would have been inconsistent with the manner in which AV ballots were mailed, her testimony still indicated that she handed her AV ballot to defendant. Latoyia testified that defendant, on his second visit to her apartment, checked her mailbox and brought a "yellow envelope" to her. Defendant opened the envelope, and gave her the paper that was inside and told her to sign it. She marked "yes" on the paper, as defendant instructed her, and signed the paper. Latoyia then gave the paper and the envelope back to defendant. In addition, Latoyia testified that she did not affix the James Baldwin stamp and the address labels to the AV envelope. The return address label listed the address of the city clerk's office. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that Latoyia gave defendant her AV ballot.

VIII. Failure to Arraign

Defendant claims that his convictions must be reversed because he was never arraigned on the information.

A

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Defendant first complained of the trial court's failure to arraign him on the information in a post-conviction motion. Accordingly, the issue is not preserved, and we review defendant's claim for plain error affecting his substantial rights. *Carines, supra* at 763, 597 N.W.2d 130.

B

A defendant has a constitutional right to adequate notice of the charges against him. *People v. Darden,* 230 Mich.App. 597, 600, 585 N.W.2d 27 (1998). A defendant must be arraigned on the information. MCR 6.113. At the arraignment, "the court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant." MCR 6.113(B). A defendant, thereafter, must enter a plea to the charge. *Id.* Plaintiff does not dispute that defendant was never arraigned on the information.

***20** Our Supreme Court has held that, if a defendant is not arraigned on the information, his convictions must be set aside. *Grigg v. People,* 31 Mich. 471, 472-473 (1875). However, failure to arraign does not require automatic reversal where the parties, including the defendant, go to trial "as if all formalities had been complied with." *People v. Weeks,* 165 Mich. 362, 365, 130 N.W. 697 (1911). In other words, we will not reverse a conviction based on a trial court's failure to arraign the defendant on the information if the defendant was present, prepared for trial, and went to trial on the merits without objection. *Id.* at 364-366, 130 N.W. 697.[29] In the present case, defendant was present and prepared for trial, and he went to trial on the merits without objection. There is no doubt that defendant was aware of the charges against him. He was acquitted of the charges in his first trial, and at the hearing on his post-conviction motions, defendant admitted that he had been fully informed of the charges. Moreover, defendant had no intention to plead guilty to the charges, as he twice went to trial without objecting to not being arraigned on the information. Under these circumstances, the trial court's failure to arraign defendant on the information did not affect his substantial rights. *Carines, supra* . Defendant is not entitled to a reversal of his convictions based on the trial court's error.

IX. Impartial Jury and the Right to Be Present

Defendant asserts that he was denied his constitutional right to an impartial jury when juror # 5 was allowed to remain on the jury after she reported seeing one of defendant's attorneys, Hugh Davis, engage in a drug deal with Harold Farmer in the courthouse parking lot. Defendant also claims that he was denied the effective assistance of counsel when his attorneys failed to challenge the continued presence of juror # 5 on the jury. In addition, defendant claims that he was denied his constitutional right to be present when he was not allowed to be present during the questioning of juror # 5 regarding what she saw in the parking lot.

A

On the fourth day of testimony, Farmer was the first witness to testify after the lunch recess. During Farmer's testimony, the court officer informed the trial court that juror # 5 had observed an incident between Farmer and one of defendant's attorneys. The trial court stopped the proceedings, and the trial judge, along with the prosecutor and defendant's two attorneys, Davis and Elliott Hall, retired to a vacant room behind the courtroom to question juror # 5. Juror # 5 explained that, during the lunch recess, she saw Davis give Farmer "something, look like money." It appeared to juror # 5 that Davis and Farmer were engaged in a drug deal. Davis clarified that Farmer had approached him, saying that he had been standing around all day and that he did not have any cigarettes. Davis handed him two cigarettes. Juror # 5 stated that, after hearing Davis's explanation, she could "[a]bsolutely" set aside the impression that Davis and Farmer engaged in a drug deal. She further stated that she could remain a fair and impartial juror. After juror # 5 left the room, both Davis and Hall agreed that juror # 5 could remain on the jury.

B

***21** A defendant may not assign error on appeal to action deemed proper by trial counsel. *People v. Green,* 228 Mich.App. 684, 691, 580 N.W.2d 444 (1998). To do so would allow the defendant to harbor error as an appellate parachute. *Id.* Accordingly, because defense counsel deemed it proper for juror # 5 to remain on the jury, defendant cannot now argue

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that juror # 5's continued presence on the jury denied him an impartial jury.

C

Nonetheless, defendant argues that he was denied the effective assistance of counsel when his attorneys agreed that juror # 5 could remain on the jury. We disagree. A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *Unger, supra* at 242, 749 N.W.2d 272. We review the trial court's factual findings for clear error and its conclusions of law de novo. *Id.*

To establish a claim for ineffective assistance of counsel, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *Yost, supra* at 387, 749 N.W.2d 753. There is a strong presumption that trial counsel provided effective assistance. *Unger, supra* at 242, 749 N.W.2d 272.

This Court is disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. *Id.* at 258, 749 N.W.2d 272; see also *People v. Johnson,* 245 Mich.App. 243, 259, 631 N.W.2d 1 (2001) (O'Connell, J.) ("[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy."). This is because nonverbal cues, such as a juror's facial expressions, body language, and the manner of answering questions, all of which this Court cannot see, are important criteria in deciding whether to challenge a juror. *Unger, supra* at 258, 749 N.W.2d 272.

In its order denying defendant's post-conviction motions, the trial court found that, based on juror # 5's demeanor, juror # 5 "genuinely believed" Davis's explanation that he handed cigarettes to Farmer and that she "genuinely committed" to set aside the incident and to decide defendant's guilt based solely on the merits. The trial court further found that juror # 5 "was not biased" and that the parking lot incident "did not cause her to have a state of mind or opinions which would improperly influence her." Defendant has not established that any of these factual findings were clearly erroneous. Based on its findings, the trial court concluded that the professional judgment of Davis and Hall not to challenge juror # 5 was objectively reasonable. Defendant has presented us with no reason to disagree. In fact, at the evidentiary hearing, both Davis and Hall testified that, when in the room behind the courtroom, it was their professional judgment that juror # 5 should remain on the jury. We will not second-guess counsel on matters of trial strategy, nor assess their actions with the benefit of hindsight. *People v. Rice (On Remand),* 235 Mich.App. 429, 445, 597 N.W.2d 843 (1999). Accordingly, defendant has not established that the actions of Davis and Hall in failing to challenge the continued presence of juror # 5 on the jury fell below an objective standard of reasonableness. [30]

D

***22** A defendant has the "right to be present during the voir dire, selection of and subsequent challenges to the jury." *People v. Mallory,* 421 Mich. 229, 247, 365 N.W.2d 673 (1984). However, the test for whether a defendant's absence from part of the trial requires reversal is whether there is any reasonable possibility of prejudice. *People v. Morgan,* 400 Mich. 527, 536, 255 N.W.2d 603 (1977); *People v. Armstrong,* 212 Mich.App. 121, 129, 536 N.W.2d 789 (1995). Defendant makes no argument that he was prejudiced by not being present during the questioning of juror # 5. Accordingly, defendant has not demonstrated that his absence requires reversal of his convictions.

X. Religious Questioning

Defendant next claims that the prosecutor cross-examined him and his wife in such a manner to suggest that his religious beliefs and practices were not valid and, thereby, he was not credible. Defendant contends that the prosecutor's questioning violated MCL 600.1436 and MRE 610 and that, regardless of whether the religious questioning affected the outcome of his trial, reversal is required. Defendant also claims that he was denied the effective assistance of counsel when counsel failed to object to the religious questioning.

A

At trial, defendant did not object to the alleged improper questioning. However, absent "swift and commendable action" by the trial court to stop improper religious

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questioning, such questioning demands a new trial. *People v. Burton,* 401 Mich. 415, 417-418, 258 N.W.2d 58 (1977); *People v. Hall,* 391 Mich. 175, 182-183, 215 N.W.2d 166 (1974).

B

Dorothy Pinkney testified that defendant became an ordained minister after they married. On cross-examination, the prosecutor asked Dorothy if defendant had any formal training as a minister. Dorothy replied that defendant had received training, but that he could explain it much better than she could. Defendant testified that he was ordained as a minister in 2002. He explained that he was tutored under several church leaders, attended classes at Moody Bible Institute and Liberty University, from where he received a certificate in "Ministry-Theology." On cross-examination, the prosecutor inquired into defendant's formal training. The prosecutor asked defendant if he had obtained a degree in divinity or whether he was licensed by the state of Michigan as a minister. The prosecutor also asked defendant, who held himself out as a Christian psychologist, if he had taken any psychology courses, obtained a psychology degree, or was licensed by the state of Michigan as a psychologist.

A prosecutor may not inquire into a witness's religious beliefs. MCL 600.1436; *People v. Bouchee,* 400 Mich. 253, 262, 253 N.W.2d 626 (1977); *People v. Leshaj,* 249 Mich.App. 417, 420, 641 N.W.2d 872 (2002); see also MRE 610 ("Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."). However, not all questioning that touches on religious matters is improper religious questioning. For example, in *People v. Jones,* 82 Mich.App. 510, 515, 267 N.W.2d 433 (1978), this Court held that the prosecutor's cross-examination of the defendant, an ordained lay minister, regarding his qualifications for that position "did not extend into any prejudicial area concerning his beliefs on the specific practices of the religion."

***23** In this case, the prosecutor did not inquire of either defendant or his wife about the substance of defendant's religious opinions. The prosecutor did not ask either witness about the tenants of defendant's religious beliefs. Compare *Hall, supra* at 180-183, 215 N.W.2d 166 (the prosecutor's question of the defendant if he believed in a Supreme Being violated MCL 600.1436). Nor did the prosecutor ask if the criminal conduct with which defendant was charged was inconsistent with defendant's religious beliefs. Compare *Bouchee, supra* at 261-262, 253 N.W.2d 626 (the trial court's question of the defendant if his religious beliefs permitted or forbade the charged conduct violated MCL 600.1436). The jury heard no testimony about the content, nature, or substance of defendant's religious beliefs. Rather, the prosecutor inquired into defendant's qualifications as a minister and as a Christian psychologist. Pursuant to *Jones, supra,* the prosecutor's inquiry was proper.

C

Because the prosecutor's inquiry into defendant's qualifications as a minister and as a Christian psychologist was proper, counsel was not ineffective for failing to object to the questioning. Counsel is not required to make a futile objection. *Fike, supra.*

XI. Jury Drawn From a Fair Cross Section

Defendant argues that he was denied his sixth amendment right to a jury drawn from a representative cross-section of the community. Defendant argued below that African-Americans were underrepresented in Berrien County jury venires and that this underrepresentation was the result of systematic exclusion. Defendant also claims that he was denied the opportunity to develop the issue through adequate hearings and discovery and that remand is required to allow him to review the necessary records and to develop the factual basis for his claim.

A

"Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court." *People v. Hubbard (After Remand),* 217 Mich.App. 459, 472, 552 N.W.2d 493 (1996). A trial court's decision on a motion to adjourn is reviewed for an abuse of discretion, *People v. Coy,* 258 Mich.App. 1, 17, 669 N.W.2d 831 (2003), as is a trial court's decision on a motion for reconsideration, *People v. Perkins,*

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280 Mich.App. 244, 248, 760 N.W.2d 669 (2008), aff'd 482 Mich. 1118, 758 N.W.2d 280 (2008).

B

A defendant is entitled to an impartial jury that was drawn from a fair cross-section of the community. *Hubbard, supra* at 472, 552 N.W.2d 493.

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *[Id.* at 473, 552 N.W.2d 493, quoting *Duren v. Missouri,* 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).]

***24** In denying defendant's sixth amendment challenge, the trial court concluded that defendant had not established either the second or third prongs of the *Duren* test. On appeal, defendant presents no argument supported by legal authority that the trial court erred in reaching its conclusion. Accordingly, defendant has abandoned the issue whether the trial court erred in denying his claim that he was denied his constitutional right to a jury drawn from a fair cross-section of the community. *Harris, supra.*

C

Our analysis, therefore, is limited to defendant's claim that he was denied the opportunity to adequately develop the record through hearings and discovery. It appears that defendant's main contention is that he was given "an extremely short period of time" in which to develop the record and that the trial court erred in failing to adjourn his trial.

After defendant's first trial ended in a mistrial, the trial court scheduled defendant's retrial to begin on September 19, 2006. The trial court adjourned defendant's trial to January 9, 2007, in order to allow the court reporter time to prepare the transcripts and to give new defense counsel, Davis and Hall,[31] time to prepare for trial. Upon request by Hall, who stated that additional time was needed to prepare for trial and to file pretrial motions, the trial court further adjourned defendant's trial to March 13, 2007.

On January 16, 2007, defendant filed a motion challenging the manner in which petit jury venires were selected in Berrien County. Defendant requested that the trial court (1) allow him access to records relating to the selection procedure of juries, (2) grant an evidentiary hearing, (3) enter an order declaring the selection procedures were discriminatory and exclusionary with regard to African-Americans, and (4) hold his trial in abeyance until the selection procedures were reformed. Defendant did not request that his trial be adjourned to allow him more time to explore the claim. A hearing was held on January 25, 2007. The trial court stated that it would grant defendant an opportunity to have an evidentiary hearing, and it requested that defendant attempt to obtain, without a court order, the necessary information from the clerk's office. The trial court urged defendant to "act promptly" because the last date for hearing motions was February 16, 2007. Defendant did not, however, request that his trial be adjourned.

On February 6, 2007, the chief judge of Berrien County entered an order granting defendant access to the jury questionnaires of the past three years, but defendant was not given permission to remove the questionnaires from the clerk's office. On February 9, 2007, defendant moved the trial court for permission to remove the questionnaires from the clerk's office. Defendant claimed that it was "onerous, burdensome, needlessly expensive and practically impossible" for him to examine and analyze the questionnaires within the physical confines of the clerk's office. Defendant further claimed that "[t]he delay in the determination of these issues has already made it unlikely that the requisite analysis and resulting evidentiary hearing can be completed before the March 13, 2007 trial date" and that "[t]he lack of the ability to remove the records" from the clerk's office will lengthen the process. Despite this last claim, there was no request by defendant to adjourn his trial.

***25** A hearing was held on February 16, 2007. The trial court stated that it learned that the information on the jury questionnaires that was needed by Wayne Bentley, defendant's proposed expert, was in electronic form, and stated that it would enter an order requiring that the necessary information be turned over to Bentley. Bentley stated that, if the information on the compact disc contained the "codes," he would have what he needed. The trial court also stated that

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it had set aside time on March 6, 2007, for an evidentiary hearing and that it was "not going to be interested in having a hearing after that date." Bentley informed the trial court that it was "almost impossible" for him to review and analyze the information by March 6, 2007, but then said that if he had a March 6 deadline, he would meet it. Davis informed the trial court that, although he and Hall "want time, as late as possible," he would assume that the evidentiary hearing would be held on March 6, 2007. Again, defendant made no request that his trial be adjourned.

On March 5, 2007, defendant submitted a three-page motion to the trial court, in which he specifically moved for an evidentiary hearing. In the motion, defendant summarized "areas of concern," which were discovered "[i]n the time allowed for analysis," that he believed led to the underrepresentation of African-Americans in jury venires. Defendant, in the motion, did not request that his trial be adjourned. Defendant also did not complain that Bentley, either because of time restrictions or because he was not given the actual jury questionnaires, was unable to adequately analyze the information regarding Berrien County's jury selection procedures or was unable to reach any conclusions with certainty.

The evidentiary hearing was held on March 6, 2007. Bentley testified at the hearing, and a report he had completed on Berrien County's jury selection procedures was admitted into evidence. Although Bentley stated that he had been under a "tremendous time restraint," he made no claim that his analysis on the jury selection procedures was, in any manner or for any reason, incomplete. The following day, March 7, 2007, defendant submitted a post-hearing brief, in which he set forth his arguments as to how he had established the three prongs of the *Duren* test. Although defendant stated that Bentley analyzed Berrien County's jury selection procedures "as much as possible under the [c]ourt [-]imposed time restraints," defendant made no claim that Bentley's analysis was incomplete because of the time restraints or for any other reason. No request was made by defendant for an adjournment of his trial at either the evidentiary hearing or in the post-hearing brief.

The above summary of the relevant proceedings establishes that, contrary to the claim in defendant's brief on appeal, the trial court never refused a request to adjourn defendant's trial. Defendant simply never requested that his trial be adjourned. In addition, defendant has not established that the trial court erred in failing to *sua sponte* adjourn his trial. The trial court granted defendant's motion for an evidentiary hearing, and scheduled the hearing for March 6, 2007. Although Bentley claimed at the February 16, 2007 hearing, that it was "almost impossible" for him to meet a March 6, 2007 deadline, he stated that, if March 6 was the deadline, he would meet it. At no time when defendant presented Bentley's findings and conclusions to the trial court, either at the evidentiary hearing, in the March 5, 2007 motion for an evidentiary hearing, or in the March 7, 2007 post-hearing brief, did defendant claim that, given the short time period in which Bentley had to analyze the information on the compact disc, that Bentley's findings and conclusions were incomplete. Defendant also never claimed that, if his trial was adjourned and, thereby, he was given more time to analyze the Berrien County jury selection procedures, he would have undertaken any additional efforts to gather evidence to support his claim.[32] Defendant, as it appears from the record, was content to rest on the evidence that had been produced at the evidentiary hearing. Under these circumstances, defendant has not established that the trial court erred in failing to *sua sponte* adjourn his trial.

***26** In addition, defendant has not shown that the trial court abused its discretion in denying his motion for reconsideration. In a motion for reconsideration, a party must show "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). The gravamen of defendant's motion for reconsideration was that the trial court, by its determination to adhere to the March 13, 2007 trial date and its specific refusal to adjourn defendant's trial, truncated and eviscerated defendant's opportunity to fully analyze Berrien County's jury selection procedures. However, because defendant never requested an adjournment of his trial and never suggested before the trial court rendered its opinion that the time limits prevented him from fully analyzing the jury selection procedures, we cannot say the trial court abused its discretion in denying defendant's motion for reconsideration. Defendant did not demonstrate that the trial court was misled by a palpable error.

XII. Trial Court Bias

Defendant asserts that he was denied due process and his state law right to an impartial decision maker when the trial judge, Judge Alfred Butzbaugh, had a financial interest in the Harbor Shores Project.[33] Defendant requests that, because

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he did not learn of Judge Butzbaugh's financial interest in the Harbor Shores Project until well after trial, we remand for an evidentiary hearing so that a factual record can be developed. This Court has previously denied defendant's request for a remand, *People v. Pinkney,* unpublished order of the Court of Appeals, entered July 3, 2008 (Docket No. 282144), and we decline to readdress the issue.

A trial judge is presumed to be fair and impartial, and the party who asserts partiality has a heavy burden of overcoming the presumption. *In re Susser Estate,* 254 Mich.App. 232, 237, 657 N.W.2d 147 (2002). Because there are no facts in the record to support defendant's claim that Judge Butzbaugh had a financial interest in the Harbor Shores Project, defendant has failed to overcome the presumption that Judge Butzbaugh was fair and impartial.

XIII. Cumulative Error

In his last issue in his appeal of his convictions, defendant asks us to reverse his convictions based on the cumulative effect of any errors. "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v. LeBlanc,* 465 Mich. 575, 591, 640 N.W.2d 246 (2002). The test is whether the cumulative effect of the errors undermines confidence in the reliability of the verdict. *People v. Dobek,* 274 Mich.App. 58, 106, 732 N.W.2d 546 (2007). "In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v. Knapp,* 244 Mich.App. 361, 388, 624 N.W.2d 227 (2001). After reviewing the evidence presented at trial, we conclude that, if the two evidentiary errors [34] had not occurred, no reasonable juror would have voted to acquit defendant. *Id.* The cumulative effect of the errors did not deny defendant a fair trial.

XIV. Probation Revocation

***27** Defendant argues that the trial court erred in revoking his probation based on a newspaper editorial written by him that was critical of Judge Butzbaugh because the editorial was protected by the First Amendment. Defendant asserts that the editorial was not a "true threat" because the paraphrased biblical passage merely predicted that God would punish Judge Butzbaugh. Defendant also asserts that the editorial was not "defamatory" because the statements in the editorial were his opinion and rhetorical hyperbole. Defendant further claims that the probation condition prohibiting "demeaning ... behavior" is unconstitutional because it is not narrowly tailored to the goals of probation and because it is vague.

A

Although defendant did not object to the probation condition prohibiting defamatory and demeaning behavior until after he was arrested for the probation violation, we may address whether the probation condition was proper, because it relates to whether defendant's probation was lawfully revoked. *People v. McNeil,* 104 Mich.App. 24, 26, 303 N.W.2d 920 (1981). We review a trial court's decision to revoke a defendant's probation for an abuse of discretion. *People v. Ritter,* 186 Mich.App. 701, 706, 464 N.W.2d 919 (1991). We review constitutional issues de novo. *People v. Harper,* 479 Mich. 599, 610, 739 N.W.2d 523 (2007).

B

Soon after the trial court denied defendant's request for a new trial, defendant wrote the following editorial, which appeared in the *People's Tribune,* a monthly newspaper published in Chicago:

Corrupt Judge Denies New Jury Trial in Pinkney Case
By Rev. Edward Pinkney

> It is our constitutional duty as American citizens to hold our elected officials accountable for their words, actions and inaction of wrongdoing. We must draw the line and decide what to do if that line is crossed, and we must use our Constitution. Most judges, prosecutors and law enforcement officials have crossed the line in the sand many times. It's time for the people: poor whites, Blacks and Hispanics to stand together and fight for what is right.
>
> We must fight for justice for all anytime you have a Judge like Alfred Butzbaugh, who is a racist. It took over 53 days to render a fifth-grade decision denying me a new trial. I am a man of God, and an innocent man, convicted by an all-white jury that violated the sanctity of their oath and were motivated by something other than the pursuit of truth and justice.

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> The corruption and the deceitfulness continues in Berrien County Courthouse. In my motion for a new trial, I argued that I was charged but never arraigned, nor did I receive due process by the dumb Judge and prosecutor. I was denied a public trial when the Judge locked the courtroom doors. One of the jurors reported to the Court that during the recess, she saw one of Rev. Pinkney's attorneys make a drug deal in the parking lot. She lied, saying several Black people came up to her and her husband and asked for money. She was not removed from the jury. The Berrien County Courthouse is so blatantly corrupt that even the legal establishment has been forced to recognize it. It does not provide a just legal system. The corruption starts at the top. They customarily and regularly deprive Blacks and Hispanics of due process. The corruption and the deceitfulness continues in Berrien County Courthouse. Judge Butzbaugh has violated his oath. I support the constitution of the United States and the State of Michigan; we are still waiting on this racist judge to do the same. Judge Butzbaugh has failed the people, the community, his duties and his office.
>
> ***28** Judge Butzbaugh, it shall come to pass; if thou continue not to hearken unto the voice of the Lord thy God to observe to do all that is right; which I command thee this day, that all these Curses shall come upon you and your family, curses shalt be in the City of St. Joseph and Cursed shalt thou be in the field, cursed [sic] shall come upon you and your family and over take thee; cursed shall be the fruit of thy body. The Lord shall smite thee with consumption and with a fever and with an inflammation and with extreme burning. They the demons shall Pursue thee until thou persist.
>
> The Herald Palladium is known as the "Herald Pollution" because of all the racist garbage the newspaper writes....
>
> When does it all stop! When are the people going to take a stand? The challenge is clear. The case of Rev. Edward Pinkney is a concentration of the criminalization of a generation of people. This is not a Black issue, nor is it just a person of color issue.

Defendant's probation officer, James Pjesky, believed that defendant, by writing the editorial, and specifically by declaring that Judge Butzbaugh was "racist," "dumb," and "corrupt," violated the 15th condition of his probation. Pursuant to the 15th condition, defendant was not to "engage in any assaultive, abusive, defamatory, demeaning, harassing, violent, threatening, or intimidating behavior, including the use, through any electronic or print media under [his] care, custody or control, of the mail, e-mail or internet." Defendant was arrested and arraigned on a probation violation charge.

At the probation revocation hearing,[35] Rev. William Wylie Kellerman, a minister in the United Methodist Church, testified that he recognized the "threatening" paragraph in the editorial as a paraphrase of several verses from the 28th chapter of Deuteronomy, the fifth book of the Bible.[36] He explained that Deuteronomy described a covenant between God and men and that the curses referred to in the paraphrased verses were visited upon men by God. Defendant testified that he did not threaten Judge Butzbaugh; he only exhorted the judge to repent. Defendant further testified that the editorial only contained his opinion.

The trial court concluded that defendant by writing the editorial violated the 15th condition of his probation. The trial court found that defendant had threatened Judge Butzbaugh. Although the paraphrase of Deuteronomy 28 was not a threat of what defendant himself would do, defendant, who was a minister, called upon the divine powers of God to curse Judge Butzbaugh, and this, according to the trial court, was a threat or, at the very least, an attempt to intimidate. The trial court also found that defendant's comments that Judge Butzbaugh was "racist" and "corrupt" and had "violated his oath" were defamatory and demeaning. According to the trial court, there was no "scintilla of evidence" to support defendant's comments, and this lack of evidence indicated that defendant's statements were false and were made with a reckless disregard for the truth. The trial court revoked defendant's probation and sentenced defendant to 3 to 10 years' imprisonment.

C

***29** Defendant first claims that his paraphrase of the verses from Deuteronomy 28 was not a "true threat," as defined by *Virginia v. Black,* 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), and *Watts v. United States,* 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), and, therefore, the trial court could not revoke his probation on the basis that he made a threat against Judge Butzbaugh. Plaintiff agrees that the paraphrase of Deuteronomy 28 "is not defensible as anything other that [sic] hyperbole" and that the paraphrase could not serve as a lawful basis for revoking defendant's

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probation. Accordingly, we need not address or decide the issue.

D

Defendant next claims that his characterizations of Judge Butzbaugh as "racist" and "corrupt" and his accusation that Judge Butzbaugh violated his oath were constitutionally protected because the comments were expressions of opinion, nothing more than "rhetorical hyperbole." Plaintiff agrees that defendant's claim that Judge Butzbaugh was "racist" was hyperbole and could not serve as a lawful basis for revoking defendant's probation. Consequently, our analysis is limited to whether the trial court was within its discretion to revoke defendant's probation based on defendant's claim that Judge Butzbaugh was "corrupt" and had violated his oath.

A trial court has wide discretion in setting the conditions of probation. *People v. Winquest,* 115 Mich.App. 215, 220, 320 N.W.2d 346 (1982). It may impose conditions that it deems are proper or are warranted by the circumstances, MCL 771.3(3), but it must be guided by principles of what is lawfully and logically related to the defendant's rehabilitation, *People v. Houston,* 237 Mich.App. 707, 719, 604 N.W.2d 706 (1999); *People v. Branson,* 138 Mich.App. 455, 458, 360 N.W.2d 614 (1984). As a condition of his probation, defendant was to refrain from engaging in any defamatory or demeaning behavior. A communication is defamatory if it "tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual." *Kevorkian v. American Medical Ass'n.,* 237 Mich.App. 1, 5, 602 N.W.2d 233 (1999). Because a demeaning communication is one that "lower[s] in dignity or standing; debase [s]," *Random House Webster's College Dictionary* (1992), it appears that any communication that is demeaning would also be defamatory, and vice versa.

A probation condition that prohibits a probationer from engaging in defamatory or demeaning communications clearly impinges on the probationer's first amendment right of free speech. See, e.g., *Garrison v. Louisiana,* 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ("The First ... Amendment[ ] embod [ies] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (quotation omitted). A probation condition may impinge on a probationer's First Amendment rights. *Branson, supra* at 458-461, 360 N.W.2d 614; *United States v. Holloway,* 740 F.2d 1373, 1383 (C.A.6, 1984). However, such a condition is subject to careful review. *United States v. Peete,* 919 F.2d 1168, 1181 (C.A.6, 1990); *People v. Terrigno,* 838 F.2d 371, 374 (C.A.9, 1987); see also *Thomas v. State,* 710 P.2d 1017, 1019 (Alas App, 1985) (probation conditions which restrict constitutional rights are subject to "strict scrutiny"). The condition must be narrowly tailored, *United States v. Crandon,* 173 F.3d 122, 128 (C.A.3, 1999); *People v. Pointer,* 151 Cal.App.3d 1128, 1139, 199 Cal.Rptr. 357 (1984), and be primarily designed or directly related to the rehabilitation of the defendant and to the protection of the public. *Crandon, supra* at 128; *Peete, supra* at 1181. The condition must be "narrowly drawn to protect the public from a situation that might lead to a repetition of the same crime." *Terrigno, supra* at 374.

***30** In the present case, defendant was convicted for paying $5 to persons to vote in favor of the recall of Yarbrough and for possessing AV ballots. The 15th condition of defendant's probation prohibited defendant from engaging in defamatory and demeaning communications. The condition was a blanket prohibition on such behavior; defendant was prohibited from making defamatory or demeaning communications about *any* person, including coworkers, neighbors, and congregants. Such a blanket prohibition is not directly related to defendant's rehabilitation of the election law crimes he committed, which impugned the integrity of the electoral process, or to the public's protection from a repetition of the crimes. *Crandon, supra* at 128.[37] Prohibiting defendant from engaging in *any* defamatory or demeaning communications is not primarily directed at preventing defendant from engaging in subsequent crimes that impugn the electoral process. Moreover, a prohibition on defamatory and demeaning communications could be narrowly tailored so that it relates directly to the election law crimes committed by defendant. For example, defendant could be prohibited from engaging in any defamatory or demeaning communications regarding Yarbrough and the other city commissioners.

To the extent that the prohibition of defamatory and demeaning behavior impinges on defendant's first amendment rights, the prohibition was not proper, as it was

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not directly related to defendant's rehabilitation or to the protection of the public. *Id* . Because the prohibition was not proper, the trial court abused its discretion in revoking defendant's probation based on a violation of the prohibition. We reverse the trial court's order revoking defendant's probation.

Defendant's convictions are affirmed, but the order revoking defendant's probation is reversed.

All Citations

Not Reported in N.W.2d, 2009 WL 2032030

Footnotes

1 Testimony was also presented that Teresa Foster, Taneka Dumas, and Schelena Miles had not voted the AV ballots that were cast in their names.

2 No member of the public objected either. The courtroom was only closed to the public during jury selection.

3 The transmission was not off for a continuous period of one to two hours. According to the testimony of the three female observers, the transmission went off for several periods, each lasting between 10 and 30 minutes.

4 In the alternative, the trial court concluded that defendant had forfeited the issue. Defendant, by not informing the trial court of the technological problems after he had learned of them, failed to provide the trial court with an opportunity to correct the problems. The trial court further concluded that defendant's substantial rights were not affected by the faulty video transmission.

5 The trial court noted the practice of referring to prospective jurors by name was standard practice in Berrien County trial courts and that the practice had been used in defendant's first trial without objection.

6 But see *Walton v. Briley,* 361 F.3d 431, 434 (C.A.7, 2004), in which the Seventh Circuit held that the right to a public trial "may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right."

7 According to the voir dire transcript, there was only one hour of jury selection before the morning break. Jury selection began at 9:04 a.m., the prospective jurors were excused for a break at 10:07 a.m., and the trial court, the attorneys, and defendant took a break at 10:16 a.m. Jury selection resumed at 10:32 a.m.

8 For example, the trial court could have suspended jury selection until the problems were fixed, obtained an express waiver of any possible violation that occurred during the one hour of jury selection, and, when jury selection began again, allowed some members of the public to remain in the courtroom should there be additional problems with the live video transmission. See *Gibbons, supra* at 116 ("[S]o long as the public at-large is admitted to the proceedings, the Sixth Amendment does not guarantee access to unlimited numbers.").

9 To determine whether a closure is justified, a court applies the "*Waller* test":

> "(1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure." *[Ndina, supra* at ¶ 56 (quotation omitted).]

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10 During opening arguments, defense counsel told the jury that Fox had been arrested for prostitution. The trial court sustained the prosecutor's objection to the statement, but noted that it had not yet ruled on the motion for rehearing and stated that it intended to allow defendant to be heard on the motion.

11 If the trial court did prevent defendant from cross-examining Fox about whether she was arrested for prostitution on the basis that no evidence corroborated Bragg's affidavit that Fox had been arrested for prostitution, we do not believe that the trial court's ruling would have violated defendant's right of confrontation. Because the prosecution disputed whether Fox had been arrested for prostitution, the trial court's limitation on the scope of cross-examination would have been reasonable. *Van Arsdell, supra.* Had the trial court allowed defendant to ask Fox if she had been arrested for prostitution and, thereby, also allowed defendant to ask Bragg if he had observed Fox being arrested for prostitution, the prosecution would have called employees from either the police department or the prosecutor's office to inform the jury that no records existed that showed that Fox had been arrested for prostitution. Requiring the jury to determine whether Fox had been arrested for prostitution would have led to a confusion of the issues.

12 Any violation of defendant's right of confrontation was harmless as to defendant's convictions on Counts III-V because Fox's testimony was not relevant to those charges.

13 Farmer's AV ballot was “receipted in” on February 21, 2005, at 2:04 p.m., which was during the time frame that Kimberly Thompson, a Benton Harbor city clerk, testified that many voters came to vote AV ballots. Fox testified that Farmer was one of the persons that she recruited to vote from the soup kitchen.

14 In the affidavit, Fox also claimed that, after defendant arrived at the soup kitchen, he told her and those she recruited to meet him at the city clerk's office because he needed to take a man there to vote. Several of the recruited people then asked defendant if they could vote an AV ballot. Defendant replied that they could if they would be out of town the following day, and he again instructed them to meet him at the city clerk's office. When they arrived at the clerk's office, they met defendant and received flyers and instructions on where to pass out the flyers.

15 MCL 168.942 provides, in pertinent part:

> The complaining witness or any other person who is called to testify in behalf of the people in a proceeding under this section shall not be liable to criminal prosecution under this act for an offense in respect to which he or she is examined or to which his or her testimony relates, except to prosecution for perjury committed in the testimony.

16 Consequently, if error occurred in limiting defendant's examination of Bragg, the error was nonconstitutional evidentiary error. *Steele, supra* at ----. A nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v. Tierney,* 266 Mich.App. 687, 712, 703 N.W.2d 204 (2005). Because the jury found Fox credible in light of the evidence suggesting otherwise, it is not more probable than not that the exclusion of Bragg's testimony concerning the context of Fox's alleged statement was outcome determinative.

17 Neither party suggests that MCL 168.932(f) is a public welfare offense, such that the Legislature intended to dispense with the *mens rea* requirement. See, e.g., *Staples v. United States,* 511 U.S. 600, 605-607, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994); *Nasir, supra* at 42, 662 N.W.2d 29.

18 A “felony is ... as bad a word as you can give to man or thing.” *Staples, supra* at 618 (quotation omitted).

19 We note that is it not surprising that courts refer to a crime requiring proof of *mens rea* as requiring proof of a “guilty mind.” The phrase “*mens rea* ” means “guilty mind.” Black's Law Dictionary (7th ed).

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20 The case relied on by defendant, *United States v. Wulff,* 758 F.2d 1121 (C.A.6, 1985), involved a criminal statute in which the Sixth Circuit refused to read a *mens rea* element.

21 We note that the district court did not definitively decide that the Texas statute, which was similar to MCL 168.932, was unconstitutional. Because the plaintiffs had requested a preliminary injunction, the district court only determined that plaintiffs had "demonstrated a substantial likelihood of success on the merits."

22 In his brief on appeal, defendant references the testimony of Ronald Smith. Smith, the soup kitchen's maintenance man, testified that he was working at the soup kitchen on February 21, 2005, and everybody was talking about getting paid $5 to vote. Defendant, however, has abandoned any argument that the trial court improperly admitted Smith's testimony. Defendant's question presented, when read in totality, refers only to the utterances that were heard by Thompson and Rolling, and, in defendant's argument, Smith's testimony is only referenced in three sentences, which merely summarize the testimony. See *Unger, supra* at 262, 749 N.W.2d 272 (an issue is not preserved for appellate review if it is not raised in the statement of questions presented); *Harris, supra* at 50, 680 N.W.2d 17 (failure to properly address the merits of an alleged error constitutes abandonment of the issue).

23 The "implied assertion" theory of hearsay is often implicated

> where out-of-court conduct of a person, sometimes verbal and sometimes nonverbal, is offered in evidence to demonstrate that person's belief, from which the inference is offered that the belief is true, when it was not the actor's intent to communicate the matter to be proved in court. *[Jones, supra* at 207, 579 N.W.2d 82.]

24 Contrary to defendant's claim, this question does not contain a second level of hearsay.

25 Laura Rittmon voted her AV ballot between 1:03 p.m. and 2:12 p .m. Detective Michael Danneffel admitted that he never interviewed Rittmon while investigating the case. Rittmon testified that she did not have any contact with the police about the case until a few days before defendant's second trial when she received a subpoena.

26 It is clear that, because the assertive utterances were not related to Counts III-V, the trial court's error did not affect defendant's convictions on those counts.

27 Under both of these standards, defendant has the burden to show prejudice. *Carines, supra* at 763, 597 N.W.2d 130; *People v. Blackmon,* 280 Mich.App. 253, 270, 761 N.W.2d 172 (2008). In his brief on appeal, defendant makes no argument that the trial court's error affected the outcome of his trial.

28 The trial court instructed the jury that it must "be unanimous as to the identity of the person" for Counts III-V. During deliberations, the jury was further instructed that it was necessary to write on the verdict form the identities of the persons whose AV ballots it found defendant possessed.

29 We reject defendant's contention that *Weeks, supra,* does not apply to the present case because he, unlike the defendant in *Weeks,* did not submit an affidavit, in which he averred that he was innocent of the charges, after the information had been filed. In *Weeks,* the Supreme Court stated that the defendant's affidavit, along with defense counsel's statement to the jury that the defendant had pleaded not guilty, justified the entry of a plea *nunc pro tunc. Weeks, supra* at 364, 130 N.W. 697. However, the Supreme Court also stated that it believed "the presence of defendant in court through a trial of the cause upon the merits represented by counsel, who failed to call attention to the omission of arraignment and plea, was a waiver of right thereto."

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Id. It cited numerous cases from other states for this proposition, and it is this proposition that we rely on in the present case.

30 Any admissions by Hall and Davis at the evidentiary hearing suggesting that they were ineffective for failing to challenge juror # 5 are not controlling. These admissions were made with the benefit of hindsight, and neither Hall nor Davis questioned their decision regarding juror # 5 until after defendant expressed his opinion that the juror should be dismissed.

> In addition, defendant has not established that, even if counsel had challenged juror # 5, the trial court would have excused her from the jury. A juror is presumed to be impartial, until the contrary is shown. *People v. Miller,* 482 Mich. 540, 550, 759 N.W.2d 850 (2008). "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* Given the trial court's findings, defendant has not proven that the impartiality of juror # 5 was in reasonable doubt.

31 Davis and Hall were substituted as defendant's counsel on September 22, 2006.

32 For example, in its order denying defendant's sixth amendment challenge, the trial court faulted defendant for not presenting any statistical information regarding the percentage of African-Americans on "the Berrien County 1st jury list, those selected and assigned to a jury panel, those whose questionnaires were undelivered, those who did not respond after the second mailing of the questionnaire, or any other category." In his brief on appeal, defendant claims that he did not have time to produce a statistician's report, "for which [he] was criticized by the court," and that, because the jury questionnaires do not contain any information on a juror's race, racial information of prospective jurors could not be obtained without an independent investigation. However, at no time before the trial court rendered its opinion, did defendant suggest that, absent the time restrictions, he would have obtained a statistician's report or conducted an independent investigation into the racial composition of jury venires.

33 According to defendant, his efforts to recall Yarbrough were directly motivated by his opposition to the Harbor Shores Project.

34 We only consider the trial court's error in admitting the assertive utterances of the unknown persons at the city clerk's office and the trial court's possible error in failing to allow defendant to cross-examine Fox and to question Bragg about Fox's alleged arrest for prostitution. We do not consider any errors relating to the information, because those errors did not affect the presentation of the case to the jury.

35 Judge Dennis Wiley presided over the hearing. Judge Butzbaugh had recused himself upon concluding that the editorial contained a threat against him.

36 Deuteronomy 28:15-22 (King James Version) reads:

> But it shall come to pass, if thou wilt hearken unto the voice of the Lord thy God, to observe to do all his commandments and his statutes which I command thee this day; that all these curses shall come upon thee, and overtake thee: Cursed shalt thou be in the city, and cursed shalt thou be in the field.... Cursed shall be the fruit of thy body.... The Lord shall smite thee with a consumption, and with a fever, and with an inflammation, and with an extreme burning, and with the sword, and with blasting, and with mildew; and they shall pursue thee until thou perish.

37 We reject plaintiff's contention that the trial court merely directed defendant to follow the ninth commandment, "Thou shall not bear false witness against thy neighbor." A defamatory or demeaning communication is not necessarily a false communication. Cf. *Mitan v. Campbell,* 474 Mich. 21, 24, 706 N.W.2d 420, (2005)

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("The elements of a defamation claim are: (1) a false *and* defamatory statement concerning the plaintiff ....") (emphasis added).

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